Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED*

1. Whether the D.C. Circuit's decision affirming the Environmental Protection Agency's ("EPA" or "the Agency") consideration of costs, rather than air quality effects, in determining whether one state's emissions contribute "significantly" to nonattainment air quality in another state under the Clean Air Act ("CAA" or "the Act"), conflicts with decisions of this Court and other D.C. Circuit decisions requiring EPA to consider the relevant statutory factor in making regulatory decisions.

2. Whether EPA's interpretation of the Act to allow selection of a cost-effectiveness cut-off point, which rested on nothing "in the language or function of [CAA] § 110(a)(2)(D)(i)(I)" and involved an exercise of "essentially unbounded" discretion, did not violate the non-delegation doctrine because EPA's rule only affects "half of the nation" rather than "all American enterprise."

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* Both questions presented in this petition – which involve the role of costs in establishing Clean Air Act regulations, and the scope and applicability of the constitutional non-delegation doctrine in Clean Air Act rulemakings – are questions that are currently before the Court, in a different Clean Air Act context, in two related cases, *Browner v. American Trucking Ass'ns*, No. 99-1257, and *American Trucking Ass'ns v. Browner*, No. 99-1426. As a result, the Court may wish to postpone action on this petition until those cases are decided.

PARTIES TO THE PROCEEDINGS

1. The following Parties were petitioners in the consolidated proceeding, the judgment in which review is sought.

In No. 98-1497, State of Michigan, Michigan Department of Environmental Quality, and State of West Virginia, Division of Environmental Protection.

In No. 98-1588, State of Ohio.

In No. 98-1596, Commonwealth of Virginia.

In No. 98-1615, State of Alabama, *ex. rel.* Bill Pryor, Attorney General.

In No. 98-1617, State of Indiana and Indiana Department of Environmental Management.

In No. 98-1619, State of North Carolina.

In No. 98-1621, State of South Carolina.

In No. 98-1499, United Mine Workers of America.

In No. 98-1500, Appalachian Power Company, *et al.*, consisting of:

Appalachian Power Company;
Baltimore Gas and Electric Company (now referred to as Constellation Power Source Generation, Inc.)
Carolina Power & Light Company;
Central and South West Services, Inc.;
Central Power and Light Company;
Public Service Company of Oklahoma;
Southwestern Electric Power Company;
West Texas Utilities Company;
Central Illinois Light Company;
Central Illinois Public Service Company;
CINergy;

Columbus Southern Power Company;
Commonwealth Edison Company;
Consumers Energy Company;
Dayton Power and Light Company, The;
Detroit Edison Company, The;
Duke Energy Company;
Florida Power Corporation;
Illinois Power Company;
Indiana Michigan Power Company;
Jacksonville Electric Authority;
Kentucky Power Company;
Kentucky Utilities Company;
Louisville Gas and Electric Company;
Madison Gas and Electric Company;
Minnesota Power Company;
Monongahela Power Company,
d/b/a Allegheny Power System, Inc.;
Northern Indiana Public Service Company;
Oglethorpe Power Corporation;
Ohio Power Company;
Ohio Valley Electric Corporation;
Oklahoma Gas & Electric Company;
Otter Tail Power Company;
PacifiCorp Electric Operations;
Plains Electric Generation & Transmission
Cooperative, Inc.;
Potomac Edison Company, The,
d/b/a Allegheny Power System, Inc.;
Potomac Electric Power Company;
Public Service Company of New Mexico;
Salt River Project;
South Carolina Electric & Gas Company;

Southern Company;
Alabama Power Company;
Georgia Power Company;
Gulf Power Company;
Mississippi Power Company;
Savannah Electric and Power Company;
Tampa Electric Power Company;
Tucson Electric Company;
Union Electric Company;
Virginia Power;
West Penn Power Company,
d/b/a Allegheny Power System, Inc.;
Edison Electric Institute;
National Rural Electric Cooperative Association;
American Public Power Association.

In No. 98-1500, Duquesne Light Company.

In No. 98-1501, Midwest Ozone Group.

In No. 98-1502, West Virginia Chamber of Commerce.

In No. 98-1504, National Mining Association.

In No. 98-1518, West Virginia Manufacturers Association.

In No. 98-1556, City of Springfield, Missouri through the Board of Public Utilities, d/b/a City Utilities of Springfield, Missouri.

In No. 98-1567, Kansas City Power & Light Company;
St. Joseph Light & Power Company;
The Empire District Electric Company;
Utilcorp United, Inc.;
City of Independence, Missouri; and
Associated Electric Cooperative, Inc.

In No. 98-1573, Indianapolis Power & Light Company

In No. 98-1585, The Alabama Forestry Association, Inc. by and through its section The Alabama Pulp and Paper Counsel.

In No. 98-1590, Dairyland Power Cooperative.

In No. 98-1598, South Carolina Public Service Authority doing business as Santee Cooper.

In No. 98-1601, American Municipal Power-Ohio.

In No. 98-1602, Fort James Operating Company;
Gilman Paper Company;
Rayonier Inc.;
Savannah Electric & Power Company;
Southeast Paper Manufacturing Company;
International Paper Company.

In No. 98-1608, PP&L, Inc.

In No. 98-1609, Council of Industrial Boiler Owners.

In No. 98-1611, Network for Workable Air Policies.

In No. 98-1616, Georgia Coalition for Sound Environmental Policy, Inc.

In No. 98-1618, Interstate Natural Gas Association of America.

In No. 99-1070, Appalachian Power Company, *et al.*

In No. 99-1093, Wisconsin Paper Council;
Madison Gas and Electric Company;
Northern States Power Company;
Wisconsin Public Service Corporation;
Wisconsin Manufacturers & Commerce.

2. The following Party was a Respondent in the consolidated proceeding, the judgment in which review is sought.

U.S. Environmental Protection Agency.

3. The following Parties were Intervenors in the consolidated proceeding, the judgment in which review is sought.

Appalachian Power Company, *et al.*

Dairyland Power Cooperative.

Virginia Manufacturers Association.

South Carolina Public Service Authority d/b/a Santee Cooper.

Detroit Public Lighting;
Grand Haven Board of Light and Power;
Holland Board of Public Works;
Lansing Board of Water and Light;
Marquette Board of Light and Power;
Michigan South Central Power Agency; and
City of Wyandotte Department of Municipal Service.

GPU Generation, Inc.

American Gas Association.

Interstate Natural Gas Association of America.

Network for Workable Air Policies.

Business Council of Alabama.

Michigan Manufacturers Association.

State of Wisconsin.

State of New York;
State of Connecticut;
State of Maine;
State of New Hampshire;
Commonwealth of Pennsylvania;
State of Rhode Island;
State of Vermont; and
Commonwealth of Massachusetts.

State of Maryland.

Consolidated Edison Co. of New York, Inc.;
KeySpan Generation LLC;
Niagara Mohawk Power Corporation;
PECO Energy Company;
Public Service Electric and Gas Company;
Rochester Gas & Electric Corporation; and
PG&E Generating.

Natural Gas Supply Association; and
Sempra Energy.

Associated Industries of Massachusetts;
New England Council; and
New Jersey State Chamber of Commerce.

PP&L, Inc.;
Atlantic City Electric Company; and

Delmarva Power & Light Company.

Natural Resources Defense Council;
Environmental Law & Policy Center of the Midwest;
Clean Air Task Force;
American Lung Association of Metropolitan Chicago;
Appalachian Mountain Club;
Citizens Action Coalition of Indiana, Inc.;
Clean Air Council;
Environmental Defense Fund;
Group Against Smog and Pollution;
Hoosier Environmental Council;
Illinois Environmental Council;
Izaak Walton League of America;
Legal Environmental Assistance Foundation;
Michigan Environmental Council;
National Environmental Trust;
Natural Resources Council of Maine;
New York Public Interest Research Group;
Ohio Citizen Action;
Ohio Environmental Council;
U.S. Public Interest Research Group; and
Wisconsin's Environmental Decade Institute.

Province of Ontario, Canada;
Norman W. Sterling, Minister of the Environment, Province of Ontario;
Charles A. Harnick, Attorney General of the Province of Ontario; and
Christopher Carl Haromy.

4. The following were *Amici* in the consolidated proceeding, the judgment in which review is sought.

Toledo Metropolitan Area Council of Governments.

North Carolina Citizens for Business and Industry.

South Carolina Chamber of Commerce;
Environmental Management Association of South Carolina; and
South Carolina Manufacturers Alliance.

Government of Canada.

DISCLOSURE STATEMENT

1. The following list of petitioners discloses the parent companies of petitioners and any entity, other than the parents, that has a 10% or greater ownership interest in any of the petitioners.

Alabama Power Company
(parent: Southern Company)

Appalachian Power Company
(parent: American Electric Power Company, Inc.)

Baltimore Gas and Electric Company (now referred to as Constellation Power Source Generation, Inc.)
(parent: Constellation Energy Group, Inc.)

Carolina Power & Light Company
(10% or greater owner: State Street Bank & Trust Company Boston)

Central and South West Services, Inc.
(parent: Central and South West Corporation)

Central Illinois Public Service Company
(parent: Ameren Corporation)

Central Power and Light Company
(parent: Central and South West Corporation)

Columbus Southern Power Company
(parent: American Electric Power Company, Inc.)

Consumers Energy Company
(parent: CMS Energy Corporation)

Dayton Power and Light Company, The
(parent: DPL Inc.)

Detroit Edison Company, The
(parent: DTE Energy Company)

Florida Power Corporation
(parent: Florida Progress Corporation)

Georgia Power Company
(parent: Southern Company)
Gulf Power Company
(parent: Southern Company)
Illinois Power Company
(parent: Dynegy, Inc.)
Indiana Michigan Power Company
(parent: American Electric Power Company, Inc.)
Kentucky Power Company
(parent: American Electric Power Company, Inc.)
Kentucky Utilities Company
(parent: Kentucky Utilities which is a subsidiary of LGE Energy Corporation)
Louisville Gas & Electric Company
(parent: LGE Energy Corporation)
Mississippi Power Company
(parent: Southern Company)
Monongahela Power Company, dba Allegheny Power System, Inc.
(parent: Allegheny Energy, Inc.)
Northern Indiana Public Service Company
(parent: NiSource Inc.)
Ohio Power Company
(parent: American Electric Power Company, Inc.)
Otter Tail Power Company
(10% or greater owner: Otter Tail Power Company ESOP)
PacifiCorp Electric Operations
(parent: PacifiCorp)
Potomac Edison Company, The, dba Allegheny Power System, Inc.
(parent: Allegheny Energy Inc.)

Public Service Company of Oklahoma
(parent: Central and South West Corporation)
Savannah Electric and Power Company
(parent: Southern Company)
South Carolina Electric & Gas Company
(parent: SCANA Corporation)
Southwestern Electric Power Company
(parent: Central and South West Corporation)
Tampa Electric Company
(parent: TECO Energy, Inc.)
Tucson Electric Power Company
(parent: UniSource Energy Corporation)
Union Electric Company
(parent: Ameren Corporation)
Virginia Power
(parent: Dominion Resources, Inc.)
West Penn Power Company, dba Allegheny Power System, Inc.
(parent: Allegheny Energy, Inc.)
West Texas Utilities Co.
(parent: Central and South West Corporation)

2. The following petitioners have no parent corporations, and no entity has a 10% or greater ownership in any of these petitioners.

CINergy Corporation
Duke Energy Corporation
Jacksonville Electric Authority
Madison Gas and Electric Company
Minnesota Power
Oglethorpe Power Corp.
Ohio Valley Electric Corporation

Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Electric Power Company
Public Service Company of New Mexico
Salt River Project
Southern Company
Edison Electric Institute
National Rural Electric Cooperative Association
American Public Power Association
National Mining Association
and
Midwest Ozone Group

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PETITION FOR A WRIT OF CERTIORARI

Industry Petitioners[1] respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). Industry Petitioners include over sixty electric utility companies; the major trade associations for the electric utility industry (the Edison Electric Institute, the American Public Power Association, and the National Rural Electric Cooperative Association); the National Mining Association; and the Midwest Ozone Group.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-61a) is reported at 213 F.3d 663 (D.C. Cir. 2000), 341 U.S. App. D.C. 306. The orders on the petitions for panel and *en banc* rehearing and the court of appeals' mandate are included in the Appendix (App. 62a-67a).

JURISDICTION

The court of appeals entered its judgment on March 3, 2000. Timely petitions for panel and *en banc* rehearing were denied by orders of the court of appeals entered on June 22, 2000. The court's mandate issued on September 13, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] Petitioners jointly filing this petition for a writ of certiorari are designated on the cover.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED IN THE CASE

Article I, § 1, of the United States Constitution provides in pertinent part that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States...."

The relevant sections of the Clean Air Act, 42 U.S.C. §§ 7401-7671q, are set forth below:

Clean Air Act § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D), provides that:

> Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall —
>
> . . .
>
> (D) contain adequate provisions —
>
> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will —
>
> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

> (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,
>
> (ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement).

Clean Air Act § 110(k)(5), 42 U.S.C. § 7410(k)(5), provides that:

> Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate,

> subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

The EPA rules at issue in this case are published at 63 Fed. Reg. 57,356 (1998). With the Clerk of the Court's permission, copies of the *Federal Register* notice containing the preamble and the final rules have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

The federal Clean Air Act ("CAA" or "the Act")[2] assigns different responsibilities to EPA and the states in order to achieve the Act's goal of "protect[ing] and enhanc[ing] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA § 101(b)(1). For example, EPA has responsibility under the Act's national ambient air quality standards ("NAAQS") program to develop ambient standards for air pollutants. CAA §§ 108, 109; *see American Trucking Ass'ns v. EPA*, 175 F.3d 1027, *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003, *and cert.*

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[2] 42 U.S.C. §§ 7401-7671q. Citations herein to the Act are to sections of the statute; the Table of Authorities includes parallel citations to the United States Code.

granted, 120 S. Ct. 2193 (2000), *Browner v. American Trucking Ass'ns*, No. 99-1257, and *American Trucking Ass'ns v. Browner*, No. 99-1426 (hereinafter referred to as "*ATA*"). Under CAA § 107(a), the states have the "primary responsibility" for ensuring that NAAQS are attained and maintained. *See also* CAA § 101(a)(3) ("...air pollution control at its source is the primary responsibility of States and local governments.") A state must, under CAA § 110(a)(1), develop and adopt a state implementation plan ("SIP"), which is a package of source-specific emission limits and other regulatory measures necessary to attain and maintain the NAAQS. SIPs must meet the requirements of CAA § 110(a)(2).

Although the states have the primary responsibility for determining how to attain and maintain the NAAQS, EPA retains oversight authority. Each state's SIP – and any revisions to a SIP – must be reviewed and approved by EPA. CAA § 110(k). EPA also has authority in certain circumstances to find a SIP "substantially inadequate" and to issue a "SIP call" requiring the state to revise its SIP. CAA § 110(k)(5).

EPA's oversight authority is not without limit, though. For example, courts have held that EPA may not, in the guise of a SIP call, order states to adopt any particular approach to achieve SIP requirements. *Virginia v. EPA*, 108 F.3d 1397, *modified on other grounds*, 116 F.3d 499 (D.C. Cir. 1997). Indeed, this Court has held that each state has authority to determine in the first instance what measures are necessary and appropriate in that state to "satisf[y] the standards of § 110(a)(2)." *Train v. NRDC*, 421 U.S. 60, 79 (1975).

In addition to spelling out the respective roles of EPA and the states in implementing the CAA, the Act contains provisions indicating that a variety of different criteria –

including public health protection and the cost and feasibility of pollution controls – are to be considered in making Clean Air Act regulatory decisions, depending on the nature of the regulatory decision in question. Over the past two decades, EPA has had considerable experience in deciding which factors are relevant under specific regulatory programs. The Court of Appeals for the D.C. Circuit, the only court with jurisdiction to review EPA actions having nationwide scope and effect (*see* CAA § 307(b)), has issued an array of opinions sometimes upholding, and sometimes setting aside, EPA's actions, based on whether EPA has properly considered (or has improperly ignored) factors relevant under the Act.

In many of these cases, including this one, the issue is whether cost is a relevant factor under the statutory provision, and if so, how cost may be considered. EPA's evaluation of the role of cost has resulted in a hodge-podge of D.C. Circuit opinions specifying different approaches for determining whether, and if so, how, EPA is to take cost into consideration in the creation and implementation of Clean Air Act regulatory programs.

For example, in a series of CAA cases concerning the adoption of NAAQS, the D.C. Circuit has read the Act's requirement that the NAAQS protect the public health and welfare with "an adequate margin of safety," CAA § 109(b)(1), as completely precluding EPA from considering cost when it decides at what level to set an ambient standard. The D.C. Circuit stated flatly that "the statute and its legislative history make clear that economic considerations *play no part* in the promulgation of ambient air quality standards under [CAA] Section 109." *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir.) (emphasis added), *cert. denied*, 449 U.S. 1042 (1980); *see also NRDC v. EPA*,

902 F.2d 962, 972-73 (D.C. Cir. 1990), *vacated in part on other grounds*, 921 F.2d 326 (D.C. Cir.), *cert. dismissed*, 498 U.S. 1075, *and cert. denied*, 498 U.S. 1082 (1991); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982). The D.C. Circuit's prohibition on the consideration of cost in the ambient-standard-setting process is currently under review by this Court in *ATA*.

In contrast, the D.C. Circuit, sitting *en banc*, unanimously held that the Act allows consideration of cost as a relevant factor in the implementation of another, essentially identical CAA provision: § 112 of the Act, which authorized EPA to set standards with "an ample margin of safety to protect the public health." *See NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987). Specifically, the court read the language of § 112 as prohibiting EPA from considering cost at the time the Agency decides what is a safe level of emissions, while allowing EPA to take cost into account thereafter in deciding what margin of safety is needed to protect public health.

In the instant case, the D.C. Circuit adopted yet another formulation to govern the consideration of cost in implementing CAA provisions: specifically, in this case, §§ 110(a)(2)(D)(i) and 110(k)(5), addressing interstate pollutant transport. Section 110(a)(2)(D)(i) requires that each state's SIP contain provisions that prohibit, consistent with other provisions of Title I of the Act, any source or other type of emissions activity within that state "from emitting any air pollutant in amounts which will contribute significantly to nonattainment [of an ambient air quality standard] in ... any other State ...." CAA § 110(k)(5) provides that if the EPA Administrator finds that a state's SIP "is substantially inadequate ... to mitigate adequately" its interstate pollutant transport, then EPA is to issue a SIP call "as necessary" to

correct the inadequacy, giving the "called-upon" state up to 18 months in which to revise its SIP in order to "mitigate adequately" its interstate pollutant transport.

EPA addressed these interstate pollutant transport provisions for the first time in a rulemaking proceeding concerning the determination of measures needed to redress what EPA concluded was contribution to nonattainment of the NAAQS for ozone that EPA had adopted in 1971 and revised in 1979. 62 Fed. Reg. 60,318 (1997). In the 1980s, many areas did not attain the ozone NAAQS for several reasons, including the complexity of the ozone formation process. Unlike other pollutants, ozone is not directly emitted from sources but is formed from complex chemical reactions of nitrogen oxides ("NO_x") and volatile organic compounds ("VOCs") in heat and sunlight.[3] NO_x, which can both create and destroy ozone,[4] is emitted mainly by fuel-burning sources, including mobile sources (*e.g.*, cars, buses, and trucks), stationary sources (*e.g.*, power plants, refineries, and industrial boilers), and "area" sources (*e.g.*, furnaces in office buildings and homes). VOCs come from mobile sources, area sources, and certain stationary sources (*e.g.*, factories using or producing VOC-containing materials like solvents and paints). The amount of ozone formed depends on the proportions of VOCs and NO_x in the atmosphere at any given location. Thus, the same degree of reduction in NO_x and VOCs will not reduce ozone by the same amount

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[3] High ozone concentrations generally occur only during late spring and summer.

[4] Because NO_x emission reductions can cause ozone levels to increase, Congress enacted CAA § 182(f), waiving NO_x controls for major stationary sources where reducing NO_x would not improve air quality. *See New York v. EPA*, 133 F.3d 987 (7th Cir. 1998).

everywhere, and NO_x reductions may actually increase ozone.

To address many areas' failure to attain the ozone NAAQS, Congress, in the 1990 Amendments to the CAA, classified ozone nonattainment areas based on the severity of the area's ozone air quality and imposed new, detailed requirements for those areas based on their classification. CAA §§ 181-185B. Under these requirements, many former nonattainment areas have attained the ozone air quality standard. However, a few areas – including large urban areas in the Northeast, Chicago, and Atlanta – have remained ozone nonattainment areas subject to §§ 181-185B. Many of the states containing these nonattainment areas, particularly in the Northeast, have claimed that their failure to attain the ozone NAAQS is due at least in part to the transport of ozone and ozone precursors (NO_x and VOCs) from upwind states.

In response to concerns about ozone transport, EPA in 1995 established an informal organization – the Ozone Transport Assessment Group ("OTAG") – including representatives from 37 states in the eastern half of the United States. OTAG conducted air quality computer modeling in order to assess whether ozone transport is actually occurring and, if so, what measures or combinations of measures might be effective in addressing such transport. Following two years of study, in June 1997 the majority of OTAG states made several conclusions and recommendations. *See* 62 Fed. Reg. at 60,376-79. One conclusion, based on results of region-wide air quality modeling, was that ozone and its precursors originating in upwind states can be transported and can contribute to nonattainment of the standard downwind. However, because this conclusion was based on geographically broad, "region-wide" modeling, OTAG's principal recommendation was that

"states must have the opportunity to conduct additional local and subregional modeling and air quality analyses" and "develop and propose appropriate levels and timing of controls." *Id.* at 60,376. For electric utilities, OTAG recommended a range of various emission control levels, from nothing more than current CAA requirements up to substantially more stringent controls, with the ultimate choices dependent on results of the recommended refined air quality modeling. *Id.* at 60,378.

Ignoring OTAG's recommendation that states be allowed to conduct more refined modeling and develop and propose their own regulatory decisions regarding whether and to what extent additional emission controls are necessary, EPA began a rulemaking in which it concluded that NO_x – but not VOC – emissions from 22 states and the District of Columbia (hereinafter, the "23 states") "contribute significantly" to ozone nonattainment in violation of § 110(a)(2)(D)(i). 62 Fed. Reg. 60,318 (1997). EPA then promulgated a rule – the so-called NO_x SIP call rule – which required each of the 23 states to reduce its ozone-season NO_x emissions to meet an EPA-determined statewide NO_x emission tonnage "budget" or "cap." 63 Fed. Reg. 57,356 (1998).

A key issue in the rulemaking – and one of the main issues argued in the litigation below – concerned EPA's application of the criterion that governed EPA's determination that each of the 23 states was contributing "significantly" to ozone nonattainment air quality in one or more other states. After determining through air quality modeling whether the contribution of a given state's NO_x (and VOC) emissions to out-of-state ozone levels exceeded a very low "measurable" level, EPA determined whether that contribution was "significant" under § 110(a)(2)(D)(i) based solely on the cost-effectiveness of emission reductions.

Specifically, EPA decided that the amount of emissions contributing "significantly" to nonattainment air quality was the amount that, in EPA's view, would cost $2000 or less per ton of NO_x emissions to reduce — a criterion that is not related at all to the air quality effects of those emissions.

Upon review, a divided panel of the D.C. Circuit (Judges Williams and Rogers, with Judge Sentelle dissenting) agreed with EPA that the Agency could use the cost-effectiveness of emission reductions as the sole criterion to determine whether a state's contribution to ozone nonattainment air quality was "significant." 213 F.3d at 674-79, 683-84, App. 14a-25a, 34a. Although acknowledging petitioners' argument that EPA's approach would force two states, each with vastly different contributions to downwind nonattainment air quality, to make essentially the same relative emission reductions (*i.e.*, those emission reductions costing $2000 per ton or less) — irrespective of resulting air quality improvements, if any — the majority simply noted that "upholding ... [EPA's] decision [to use cost-effectiveness] logically entails upholding this consequence." *Id.* at 679, App. 25a.

In dissent, Judge Sentelle explained that "[t]he majority makes a fundamental mistake by divorcing the adverb 'significantly' from the verb it modifies, 'contribute,' ... [and] from the rest of the statutory provision in issue." *Id.* at 696, App. 59a. Moreover, Judge Sentelle noted that the majority's decision could not be reconciled with other decisions of the court – *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), and *American Petroleum Inst. v. U.S. EPA*, 52 F.3d 1113 (D.C. Cir. 1995) – requiring EPA to base regulatory decisions on the factor or factors found in the applicable statutory provision. *Id.* at 696, App. 58a-59a. Because EPA considered a criterion that Congress did not intend it to

consider in determining the significance or insignificance of a state's air quality contribution – *i.e.*, the cost-effectiveness of emission reductions (in dollars per ton of emissions removed) – Judge Sentelle would have set aside the rule.

Petitioners below also argued that EPA had not justified its $2000-per-ton cost-effectiveness cut-off point for calculating the amount of emissions that contributes "significantly" and therefore that EPA's action violated the constitutional non-delegation doctrine. The majority agreed that EPA's choice of a cost-effectiveness cut-off point was not based "on anything in the language or function of § 110(a)(2)(D)(i)(I)" and "was essentially unbounded." *Id.* at 680, App. 27a. Nevertheless, the majority held that because the rule affects only "half of the nation" and not "all American enterprise," the non-delegation doctrine was not violated. *Id.*, App. 28a.

The D.C. Circuit denied petitions for panel and *en banc* rehearing, with Judge Sentelle dissenting from the denials. App. 62a-65a.

REASONS FOR GRANTING THE PETITION

Industry Petitioners do not question that cost is to play a key role in the implementation of the CAA in general and in the implementation of the interstate pollutant transport provisions in particular.[5] However, contrary to basic principles of statutory interpretation and administrative law, EPA and the majority below fundamentally misconstrued the

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[5] Indeed, many of Industry Petitioners have also – as parties in *ATA*, now pending before this Court (Nos. 99-1257 and 99-1426) – filed briefs describing the role that costs should play in the establishment of ambient standards under the Act.

role of cost and cost-effectiveness in the implementation of these statutory provisions to authorize regulation that EPA deems "cost-effective" even when the regulation has not been justified on air quality grounds. Congress' intent in writing these provisions into the Act in 1990 was to establish a two-step process under which EPA must first, under § 110(a)(2)(D)(i), determine whether a state's contribution to nonattainment is "significant" based on the state's *air quality* contribution to out-of-state nonattainment air quality, not based on the dollars-per-ton cost of achieving emission reductions. Then, if an adequate showing of significant contribution has been made based on air quality effects, an affected state may, consistent with § 110(k)(5), take cost (or cost-effectiveness) into account in deciding the extent and nature of the control measures necessary "to mitigate adequately" its "significant" contribution to another state's nonattainment air quality.

The majority's decision upholding EPA's approach would allow EPA, in implementing § 110(a)(2)(D)(i), to ignore Congress' intent, as expressed in the language of the statute, regarding the relevant factor that must govern EPA's regulatory decisions. As discussed below, this result conflicts with this Court's case law and with other D.C. Circuit cases that have given effect to Congress' decision to constrain an Executive Branch agency's discretion by allowing the agency to consider only relevant factors provided in the statute in making regulatory determinations.

Finally, even if EPA were not prohibited from considering as its sole factor the cost-effectiveness of emission reductions in determining whether one state's contribution to another state's ozone nonattainment air quality is "significant," EPA could not, consistent with the Constitution, exercise the unbounded discretion in selecting a

cost-effectiveness cut-off point that the majority below found EPA had exercised. There is no basis in the law for the unprecedented new doctrine, created by the majority, that authorizes Executive Branch agencies to take action that is unbounded by *any* obligation to follow, discern, or articulate intelligible principles in a statute and that is unconstrained by any obligation to obey Congress' proscription against arbitrary and capricious action.

I. ALLOWING EPA TO DETERMINE "SIGNIFICANT" CONTRIBUTION BASED ON THE COST-EFFECTIVENESS OF EMISSION REDUCTIONS, RATHER THAN BASED ON THE AIR QUALITY EFFECTS OF EMISSIONS, CONFLICTS WITH BASIC PRINCIPLES OF STATUTORY INTERPRETATION AND ADMINISTRATIVE LAW AS REFLECTED IN THE DECISIONS OF THIS COURT AND THE D.C. CIRCUIT.

The panel majority below found that, because Congress had not expressly precluded EPA from considering cost-effectiveness in implementing § 110(a)(2)(D)(i), EPA could properly rely on cost-effectiveness, to the exclusion of air quality effects, in assessing whether one state's emissions contribute "significantly" to another state's ozone nonattainment air quality. Specifically, despite acknowledging that, under § 110(a)(2)(D)(i), EPA must first establish that a state's emissions result in "*a measurable [air quality] contribution*" to nonattainment in another state, 213 F.3d at 684, App. 34a (emphasis in original), the majority held that EPA may then properly ignore the air quality effects of the state's emissions and determine the amount of

emissions contributing "significantly" based solely on an EPA-selected cost-effectiveness criterion for reducing emissions. This novel reading of the Act is contrary to basic principles of statutory and administrative law and produces an absurd result: determining whether one state's emissions contribute "significantly" to another state's nonattainment air quality does not turn on whether, for example, those emissions come from a distant state and produce hardly any air quality impact, or come from a nearby state and produce a large air quality impact.[6] Rather, under EPA's approach, the significance *vel non* of an air quality contribution depends only on whether a state's emissions can be (in EPA's view) cost-effectively reduced.

Judge Sentelle, in dissent, examined the language and structure of § 110(a)(2)(D)(i) and concluded that Congress clearly did not intend to allow the cost-effectiveness of emission reductions to govern determinations of whether a contribution to nonattainment air quality is "significant" – a statutory criterion that on its face calls for defining and assessing air quality effects. As Judge Sentelle explained, the majority improperly divorced the adverb "significantly" from the verb it modifies, "contribute," and from the rest of § 110(a)(2)(D)(i), which addresses the amount of emissions and the effect of that amount on air quality: "Given [§ 110(a)(2)(D)(i)(I)'s] mandate as a whole, it becomes clear that EPA and the majority have to contort the statute's language by isolating the term significantly and ignoring the terms air pollutant, amounts, and contribute in order to work

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[6] The majority acknowledged this result but simply made the circular observation that its decision "logically entails upholding this consequence." 213 F.3d at 679, App. 25a.

cost considerations into the statute." 213 F.3d at 696, App. 59a-60a.

Judge Sentelle is correct. The statute's language makes plain that Congress decided that EPA's evaluation of whether one state's emissions do or do not contribute significantly to nonattainment air quality in another state must be based on an analysis of *air quality* contribution, not on the cost of achieving emission reductions irrespective of the air quality effects of those reductions. EPA's approach would read Congress' limitation of "significance" out of the Act, would preclude states from knowing whether their contributions were "significant" until EPA defined "cost-effectiveness," and would allow EPA to take from the states the primary responsibility for implementing § 110(a)(2)(D)(i), contrary to congressional intent. Moreover, a state's continuing compliance with § 110(a)(2)(D)(i) would depend not on the interstate air quality effects of its emissions, but on the changing costs of emission controls (and the resulting change in those controls' dollar-per-ton-reduced cost-effectiveness) as determined by EPA. This result cannot be reconciled with the air quality purposes of the Act or with fundamental principles of law.

In observing that "no reasonable reading of the statutory provision in its entirety allows the term significantly to springboard costs of alleviation into EPA's statutorily-defined authority," 213 F.3d at 696, App. 59a, Judge Sentelle was mindful of the well-established principle that an agency's authority to promulgate regulations is limited to the authority delegated to it by Congress. *See id.*, App. 58a (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). In reviewing an agency's action, courts may not presume that Congress has delegated authority to the agency whenever Congress has not expressly withheld that authority

from the agency. Otherwise, agencies would "enjoy virtually limitless hegemony" contrary to Article I, § 1, of the Constitution. *Oil, Chemical, and Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 90 (D.C. Cir.) (citation omitted), *cert. denied*, 516 U.S. 821 (1995); *see also Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (finding that the Secretary of Labor, in assessing "significant" risk of harm, could not substitute cost considerations for the statute's decisional criterion, risk of harm to health).

The majority's decision below stands for the proposition that an Executive Branch agency may with impunity ignore this well-established principle and make regulatory decisions without regard to the statutory language. Instead of requiring EPA to conduct an evaluation of the "significance" of a contribution based on air quality effects, as Congress instructed, the majority allowed EPA to exercise authority to determine "significance" based entirely on an irrelevant statutory factor, the cost-effectiveness of reducing emissions.

The majority's opinion not only conflicts with basic principles of law announced in precedents of this Court, as discussed above, it also ignores D.C. Circuit cases holding that EPA may not supplant the decisional criterion that Congress provided in the statute with an irrelevant decisional criterion in order to implement the Agency's policy preferences. For example, in *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), the D.C. Circuit relied on this principle in rejecting EPA's use of an "adverse health" criterion in the context of a statutory provision that did not include adverse health effects as the decisional criterion. *Ethyl* involved CAA § 211(f)(1), which prohibits new fuel additives unless they are "substantially similar" to additives already in use. A waiver for a new additive can be obtained

if the additive will not "cause or contribute to a failure of any emission control device...." CAA § 211(f)(4). Although EPA found that the additive in question would not cause or contribute to such failure, it denied the requested waiver based on uncertainty about the additive's effects on public health. The court concluded that the determination whether an additive would "contribute to a failure" of a control device may be based only on "the effects of a fuel additive[]" on emission control devices, not on concerns about health effects, and ordered EPA to issue the waiver. *Ethyl*, 51 F.3d at 1060; *see also American Petroleum Inst. v. U.S. EPA*, 52 F.3d 1113 (D.C. Cir. 1995) (striking down EPA's reformulated gas oxygenate requirement because EPA based its decision on economic benefit rather than the relevant CAA factor, reduction of VOCs).

These precedents all stand for the principle that an agency must base its regulatory decisions on the decisional criterion specified by Congress in the statute. In § 110(a)(2)(D)(i), Congress specified air quality effects as the *sole* decisional criterion for assessing the "significance" of a contribution to nonattainment air quality. Once a state has been found to have emissions that contribute significantly to another state's nonattainment air quality, Congress provided, through § 110(k)(5)'s requirement "to mitigate adequately" the significant interstate air quality contribution, a means for costs to be considered. By contrast, EPA's NO_x SIP call rule does not define "contribute significantly to nonattainment" based on § 110(a)(2)(D)(i)'s decisional criterion: air quality effects. Rather, EPA substituted, for the statutory criterion of air quality effects, its $2000-per-ton cost-effectiveness cut-off point.

Because the majority's decision below conflicts with precedent of this Court and D.C. Circuit law establishing that

an agency must base its decisions on the criteria that Congress provided, this Court should grant certiorari.

II. THE COURT OF APPEALS' DECISION TURNS UPSIDE-DOWN THE PRINCIPLE OF UNCONSTITUTIONAL DELEGATION.

In reviewing rules adopted by administrative agencies, the D.C. Circuit has used two different standards for evaluating the agency's exercise of discretion. Under one approach – that followed in *ATA*, now under review in this Court – the D.C. Circuit evaluated whether the agency had articulated an intelligible principle under the statute to govern its action and, in the absence of articulation of an intelligible principle, held that the agency's action violated the Constitution's non-delegation doctrine. In the other approach, the court evaluated the agency's exercise of discretion pursuant to the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), or similar standards found in specific statutes such as CAA § 307(d)(9).[7] Whichever of these two standards the court applied, however, it consistently – and properly – refused to leave undisturbed an agency's "unbounded" exercise of discretion.

In this case, by contrast, the majority applied neither standard. Rather, the court created an unprecedented new legal standard – one that authorizes Executive Branch

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[7] *See, e.g., American Lung Ass'n v. EPA*, 134 F.3d 388, 391-93 (D.C. Cir. 1998), *cert. denied*, 120 S. Ct. 58 (1999); *see generally American Trucking Ass'ns v. EPA*, 195 F.3d 4, 14-16 (D.C. Cir. 1999) (Silberman, J., dissenting), *cert. granted*, 120 S. Ct. 2003, *and cert. granted*, 120 S. Ct. 2193.

agencies to act unbounded by any obligation to follow, discern, or articulate intelligible principles in a statute *and* unfettered by any obligation to obey Congress' proscription against arbitrary and capricious action.

In upholding EPA's significant contribution determination, the majority recognized that "EPA's cost-effectiveness criterion [$2000 per ton of emissions reduced] is a radically incomplete line-drawing device" and that EPA "*neither rests that benchmark on anything in the language or function of § 110(a)(2)(D)(i)(I)*, nor otherwise explains why the resulting cut-off point represents the right degree of 'cost-effectiveness' (*i.e.*, why 'highly cost-effective' should be at that 'height')." 213 F.3d at 680 (emphasis added), App. 27a. Accordingly, the panel held, EPA's "*selection of the cut-off point was essentially unbounded.*" *Id.* (emphasis added).

Despite this holding, the panel stated that EPA's selection of its $2000-per-ton cut-off point does not run afoul of the Constitution's non-delegation doctrine because, unlike the rules at issue in *ATA*, the rule does not affect "all American enterprise" and imposes "substantial" control costs on only "[n]early half of the nation." *Id.*, App. 28a. The panel's opinion, if left undisturbed by this Court, would stand for the startling proposition that the question whether the Constitution's non-delegation doctrine applies depends on a court's view at any given time of the number of states, companies, or industries affected by the Executive Branch action being reviewed – and that no constitutional constraint on Executive Branch authority exists if an action affects no more than "half of the nation" or less than "all American enterprise."

Even if the non-delegation doctrine were not implicated by the panel's conclusions regarding EPA's selection of its $2000-per-ton cut-off point, then at the very least the panel's

conclusions should lead to the rejection of EPA's unbounded exercise of discretion as a violation of Congress' proscription, in the APA, of agency action that is arbitrary and capricious. Rather than applying the congressionally mandated APA standard of review available to persons entitled to relief from arbitrary and capricious agency action, however, the majority allowed EPA's unbounded exercise of discretion to go unchecked by *any* guiding principle and free from *any* effective judicial review. This approach is inconsistent with the law and should not be allowed to stand.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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September 20, 2000

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 9, 1999 Decided March 3, 2000

No. 98-1497

STATE OF MICHIGAN,
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY AND
STATE OF WEST VIRGINIA, DIVISION OF
ENVIRONMENTAL PROTECTION,
Petitioners

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent

NEW ENGLAND COUNCIL, INC., *et al.*,
Intervenors

Consolidated with

98-1499, 98-1500, 98-1501, 98-1502, 98-1504, 98-1518, 98-1556, 98-1567, 98-1573, 98-1585, 98-1588, 98-1590, 98-1596, 98-1598, 98-1601, 98-1602, 98-1608, 98-1609, 98-1611, 98-1615, 98-1616, 98-1617, 98-1618, 98-1619, 98-1621, 99-1070, 99-1093

On Petitions for Review of an Order of the
Environmental Protection Agency

Susan E. Ashbrook, Assistant Attorney General, State of Ohio, *James C. Gulick,* Special Deputy Attorney, State of North Carolina, *Andrea B. Field, Theodore L. Garrett,*

Todd Palmer, Jonathan S. Martel, William F. Pedersen and *Scott H. Segal* argued the causes for petitioners. With them on the briefs were *Betty D. Montgomery*, Attorney General, State of Ohio, *Andrew S. Bergman*, Assistant Attorney General, *Michael F. Easley*, Attorney General, State of North Carolina, *J. Allen Jernigan*, Special Deputy Attorney General, *James P. Longest, Jr.*, and *Amy R. Gillespie*, Assistant Attorneys General, *Bill Pryor*, Attorney General, State of Alabama, *Tommy E. Bryan*, Assistant Attorney General, *Jeffrey Modisett*, Attorney General, State of Indiana, *Daniel B. Dovenbarger*, Chief Counsel, *Jennifer M. Granholm*, Attorney General, State of Michigan, *Thomas Casey*, Solicitor General, *Alan F. Hoffman*, Assistant Attorney General, *Charles M. Condon*, Attorney General, State of South Carolina, *Mark E. Earley*, Attorney General, State of Virginia, *Roger L. Chaffe*, Senior Assistant Attorney General, *Stewart T. Leeth*, Assistant Attorney General, *Thomas H. Zerbe*, Senior Counsel, State of West Virginia, *Samuel L. Finklea, III, Grant Crandall, Eugene M. Trisko, Norman W. Fichthorn, Mel S. Schulze, David M. Flannery, Kathy Beckett, Harold P. Quinn, Jr., Michael D. Hockley, J. Lister Hubbard, R. Brooke Lawson, III, Robert E. Lannan, II, Terry J. Satterlee, Alok Ahuja, Mark E. Shere, Bryan G. Tabler, Jeffrey L. Landsman, Jennifer S. McGinnity, Howard E. Shapiro, Margaret Claiborne Campbell, Thomas E. Knauer, David R. Straus, Deborah E. Jennings, Julie R. Domike, Patricia T. Barmeyer, Lisa G. Dowden, Brian J. Renaud, Rhonda L. Ross, Jeffrey F. Cherry, Katherine L. Rhyne, John M. Koeppl, Henry J. Handzel Jeffrey A. Knight, Joan Dreskin, Kevin B. Belford, Pamela A. Lacey, Gene E. Godley, Michael H. Levin* and *Edmund B. Frost. Earle D. Getchell Jr., Neal J. Cabral, Christopher D. Man, Jacqueline H. Fine, Jon S. Faletto* and *John P. Proctor* entered appearances.

James E. Doyle, Attorney General, State of Wisconsin, and *Philip Peterson* and *Thomas L. Dosch*, Assistant Attorneys General, were on the brief for intervenor State of Wisconsin.

Louis E. Tosi and *William L. Patberg* were on the brief for amicus curiae Toledo Metropolitan Area Council of Governments.

Charles S. Carter and *Deborah Ann Hottel* were on the brief of amici curiae South Carolina Chamber of Commerce, Environmental Management Association of South Carolina, South Carolina Manufacturers Alliance, and South Carolina Farm Bureau Federation.

Jon M. Lipshultz and *Patricia R. McCubbin*, Attorneys, U.S. Department of Justice, argued the causes for respondent. With them on the brief were *Lois J. Schiffer*, Assistant Attorney General, and *Jan Tierney*, *Howard Hoffman*, *Amey W. Marrella* and *Dwight C. Alpern*, Attorneys, U.S. Environmental Protection Agency.

J. Jared Snyder, Assistant Attorney General, State of New York, argued the cause for state intervenors. With him on the brief were *Elliot Spitzer*, Attorney General, *Peter H. Schiff*, Deputy Attorney General, *Thomas F. Reilly*, Attorney General, State of Massachusetts, *William L. Pardee*, Assistant Attorney General, *M. Dukes Pepper, Jr.*, Assistant Counsel, State of Pennsylvania, *Sheldon Whitehouse*, Attorney General, State of Rhode Island, *Michael Rubin*, Environmental Advocate, *William H. Sorrell*, Attorney General, State of Vermont, *Ronald A. Shems*, Assistant Attorney General, *Jennifer L. Wurzbacher*, Assistant Attorney General, State of Maryland, *Richard Blumenthal*, Attorney General, State of Connecticut, *Richard F. Webb*, Assistant Attorney General, *Andrew Ketterer*, Attorney General, State of Maine, *Paul Stern*, Deputy Attorney General, *Philip McLaughlin*, Attorney General, State of New Hampshire, and *Maureen D. Smith*, Assistant Attorney General.

Kathleen L. Millian argued the cause for intervenor Her Majesty the Queen in Right of Ontario (Province of Ontario, Canada). With her on the brief was *Bruce J. Terris*.

David Hawkins and *Raissa Griffin* were on the brief for intervenor Natural Resources Defense Council, et al. *Andrew P. Caputo* entered an appearance.

Patrick M. Raher, John G. Roberts, Jr., Catherine E. Stetson, Michael R. Barr, Michael A. Conley, Theresa Fenelon Falk, John H. Sharp, Paul G. Wallach and *Kenneth R. Meade* were on the brief for industry intervenors.

Richard A. Wegman was on the brief for intervenor the Government of Canada.

Before: WILLIAMS, SENTELLE and ROGERS, *Circuit Judges*.

Opinion *Per Curiam*.*

Dissenting opinion filed by *Circuit Judge* SENTELLE.

Introduction

Under the Clean Air Act the Environmental Protection Agency promulgates national ambient air quality standards ("NAAQS") for air pollutants, and states must then adopt state implementation plans ("SIPs") providing for the implementation, maintenance, and enforcement of the NAAQS; such plans are then submitted to EPA for approval. *See* Clean Air Act ("CAA") § 110(a)(1), 42 U.S.C. § 7410(a)(1) (1994). Even after a SIP is approved, EPA may at a later time call for SIP revisions if the Administrator finds a SIP inadequate to attain or maintain the NAAQS, to meet the dictates of pollutant transport commissions, or "to otherwise comply with any requirement of this chapter." CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5).

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* Judge Williams wrote Parts I.B-C and II.B; Judge Sentelle wrote Parts I.A, II.A, II.C, and III.A; Judge Rogers wrote Parts III.B and IV.

In October 1998 EPA issued a final rule mandating that 22 states and the District of Columbia revise their SIPs to mitigate the interstate transport of ozone.[1] *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone ("Final Rule"), 63 Fed. Reg. 57,356 (1998). The statutory hook for EPA's action was a 1990 amendment to the Clean Air Act which requires that SIPs contain "adequate provisions" prohibiting

> any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard.

CAA § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994). EPA uniformly required that each state reduce nitrogen oxides (NO_x—an ozone precursor) by the amount accomplishable by what EPA dubbed "highly cost-effective controls," namely, those controls EPA found capable of removing NO_x at a cost of $2000 or less per ton. Numerous petitions for review challenge various aspects of EPA's decision.

In Part I we reject the following claims: that EPA could not call for the SIP revisions without convening a transport commission; that EPA failed to undertake a sufficiently state-specific determination of ozone contribution; that EPA unlawfully overrode past precedent regarding "significant" contribution; that EPA's consideration of the cost of NO_x reduction violated the statute; that EPA's scheme of uniform

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[1] The states are Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

controls is arbitrary and capricious; that CAA § 110(a)(2)(D)(i)(I) as construed by EPA violates the non-delegation doctrine.

In Part II we hold that the record does not support including Wisconsin in the SIP call, nor does it support creating NO_x budgets based on the entire emissions of Missouri or Georgia. We reject the claim that South Carolina was improperly included in the SIP call.

In Part III we reject the claim that EPA impermissibly intruded on the statutory rights of states to fashion their SIPs. We also reject the claim that EPA violated the Regulatory Flexibility Act.

In Part IV we reject the claim that EPA arbitrarily revised the definition of a "NO_x budget unit." We reject all of the claims raised by the Council of Industrial Boilers save one: we hold that EPA failed to provide adequate notice of a change in the definition of an electric generating unit. We also hold that EPA did not provide adequate notice of a change in the control level assumed for large, stationary internal combustion engines, but we reject the claim that EPA failed to follow its own standards in defining such engines. Finally, we uphold EPA's limits on early reduction credits, and EPA's use of a 15% multiplier for calculating emissions from low mass emission units.

We note at the outset that one challenge has been stayed. In 1979, EPA set the acceptable level for ozone in the ambient air at 0.12 parts per million ("ppm"), averaged over intervals of one hour. This standard is commonly known as the "1-hour standard." By 1997, EPA had concluded that the 1-hour standard no longer adequately protected public health. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997). Pursuant to the agency's statutory mandate to review and revise NAAQS as appropriate, 42 U.S.C. § 7409(d)(1), EPA promulgated a new, more stringent

"8-hour standard" which limits ozone levels to 0.08 ppm, averaged over an 8-hour period. *See* 62 Fed. Reg. 38,856 (codified at 40 C.F.R. § 50.10).

EPA has undertaken the phasing out of the 1-hour standard on an area-by-area basis, mandating that the standard would no longer apply to an area once it is "determine[d] that the area has air quality meeting the 1-hour standard." 40 C.F.R. § 50.9(b). The call for SIP revisions in question here requires the covered upwind states to submit SIP revisions pursuant to the 8-hour standard even though EPA was not designating any 8-hour nonattainment areas prior to July 1999. *See* 63 Fed. Reg. at 57,370; Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 6103, 112 Stat. 107, 465 (1998) (providing that states submit suggested designations no later than July 1999 and EPA finalize those designations no later than July 2000). EPA maintains that it has the authority to include the 8-hour standard in the current § 110(a)(2)(D)-specific SIP call pursuant to its authority under § 110(a)(1). Section 110(a)(1) provides that

> [e]ach State shall . . . adopt and submit to [EPA], within 3 years (or such shorter period as [EPA] may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) . . . , a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State.

42 U.S.C. § 7410(a)(1).

State and Industry/Labor petitioners initially attacked the challenged SIP call on the basis that EPA exceeded its statutory authority and acted arbitrarily in basing the SIP call on the 8-hour standard when the agency had not yet designated any areas as being in nonattainment under the new standard. After petitioners' final briefs were submitted, we held in *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d

1027, *reh'g granted in part, den'd in part* 195 F.3d 4 (D.C. Cir. 1999), that the new NAAQS based on the 8-hour standard was derived from a construction of the Clean Air Act that rendered the relevant provision an unconstitutional delegation of legislative power and remanded the case to the agency. *See id.* at 1033-40. Seizing on this holding, petitioners added in their reply briefs that if this court does not accept the contention in their original briefs as to why EPA impermissibly relied on the 8-hour standard, then we should hold that *American Trucking* means that EPA cannot rely on the 8-hour standard because it was promulgated in violation of the non-delegation doctrine.

Regardless, EPA moved to stay consideration of the issues involving the 8-hour standard because the agency has stayed the 8-hour findings contained in the challenged SIP call. We granted the motion. Because EPA's stay removes the 8-hour findings as a basis for the SIP call, we will resolve only the issues involving the 1-hour standard.

I. *General Claims*

A. Transport Commission

States have the primary responsibility to attain and maintain NAAQS within their borders. *See* CAA § 107(a), 42 U.S.C. § 7407(a). When EPA concludes that an "implementation plan for any area is substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately the interstate pollutant transport described in section [176A] or [184], or to otherwise comply with any requirement of this chapter," the CAA requires EPA to order a state to revise and correct its SIP "as necessary" ("SIP call"). CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5). One such "requirement of this chapter," is the "good neighbor provision" of section 110(a)(2)(D). As amended, section 110(a)(2)(D) requires that a SIP "contain adequate provisions"

> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . *contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard* . . . [and]
>
> (ii) insuring compliance with the applicable requirements of sections [126] and [115] . . . (relating to interstate and international pollution abatement).

42 U.S.C. § 7410(a)(2)(D) (emphasis added). Section 126(b) enables an individual state or a political subdivision of a state to petition EPA to make a "finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of [§ 110(a)(2)(D)(ii)]." 42 U.S.C. § 7426(b). EPA may make or deny such a finding. *See id.* Section 115 pertains to petitions made by foreign countries. *See* 42 U.S.C. § 7415.

Title I, the subchapter referenced in section 110(a)(2)(D), also includes sections 176A and 184, the provisions referenced in section 110(k)(5). In 1990, Congress added a provision to section 176A stating that EPA "may" establish an interstate air pollution transport region whenever EPA "has reason to believe that the interstate transport of air pollutants from one or more States contributes significantly to a violation of a national ambient air quality standard in one or more other States." 42 U.S.C. § 7506a(a). The section also provides that whenever EPA "establishes a transport region . . . [EPA] shall establish a transport commission." 42 U.S.C. § 7506a(b)(1). Among other things, a section 176A commission is to assess the interstate transport situation in the relevant transport region, assess interstate pollution mitigation strategies, and recommend to EPA measures necessary "to ensure that the plans for the relevant States meet the requirements of [section 110(a)(2)(D)]." 42 U.S.C.

§ 7506a(b)(2). In addition, section 176A permits a transport commission to request that EPA "issue a finding under [section 110(k)(5)] . . . that the implementation plan for one or more of the States in the transport region is substantially inadequate to meet [section 110(a)(2)(D) requirements]." 42 U.S.C. § 7506a(c). After public comment, EPA has the authority to approve, approve in part, or disapprove such a request. *See id.*

In part, section 184, an ozone-specific provision, establishes an ozone transport region in the northeast ("NOTR") and sets the deadline for convening the transport commission required as a result of NOTR's establishment. *See* 42 U.S.C. § 7511c(a). The section also requires that "[i]n accordance with [section 110] . . . each State included [or subsequently included] within a transport region established for ozone shall submit a State implementation plan or revision" regarding vehicle inspection programs and volatile organic compounds control technology. 42 U.S.C. § 7511c(b). In addition, section 184 contains provisions giving states within an established transport region the opportunity to use their section 176A-established transport commission to help develop additional ozone control measures. *See* 42 U.S.C. § 7511c(c).

Efforts to control states' upwind contributions to ozone pollution continued to fall short during the early 1990s. In 1995, upon the recommendation of the Environmental Council of the States, thirty-seven states and representatives from EPA, industry, and environmental groups formed a national work-group called the Ozone Transport Assessment Group ("OTAG") to study and devise solutions to the interstate ozone transport problem. *See* 62 Fed. Reg. 60,318, at 60,319; EPA, Ozone Transport Assessment Group Executive Report, EPA Document No. A 95-56, Doc. No. II-G-05 ("Executive Report") at ii. More specifically, OTAG's purpose was to "identify and recommend a strategy to reduce

transported ozone and its precursors, which, in combination with other measures, will enable attainment and maintenance of the ozone standard in the OTAG region." Executive Report at ii. OTAG concluded that upwind states needed to reduce NO_x emissions in order to address the transport problem. However, the OTAG members could not agree on specific control measure recommendations. *See* 62 Fed. Reg. at 60,320. In response to OTAG's efforts, EPA engaged in further analysis and devised the SIP call challenged here.

Industry/Labor petitioners argue that the CAA required EPA to convene a transport commission pursuant to sections 176A/184 prior to issuing the challenged SIP call. EPA concedes that OTAG was not a statutorily-mandated 176A/184 transport commission as defined in the CAA. If a transport commission is required, EPA would be bound by statute to follow certain procedures in establishing and executing its commission obligation. However, we hold that the CAA does not require EPA to establish such a commission.

Industry/Labor petitioners contend that the reference to the transport commission provisions in section 110(k)(5) and the mandate of section 110(a)(2)(D) that SIP requirements be consistent with Title I provisions obligated EPA, prior to issuing the SIP call, to create a transport commission guided by the terms in sections 176A and 184 of the statute. Industry/Labor petitioners also note that sections 176A and 184 reference both sections 110(a)(2)(D) and 110(k)(5). *See* 42 U.S.C. §§ 7506a(b)(2), (c), 7511c(c)(5). From this hodgepodge of largely unrelated cross-references, Industry/Labor petitioners argue that EPA can only issue a section 110(k)(5) SIP call to enforce section 110(a)(2)(D)'s requirement after forming a 176A/184 transport commission. We disagree.

As a threshold matter, subsections 176A(a) and (b)(1) make clear that EPA must establish a transport commission *if* the agency exercises its discretion to create a transport region pursuant to section 176A(a). *See* 42 U.S.C. §§ 7506a(a),

(b)(1). However, EPA can address interstate transport apart from convening a 176A/184 transport commission as subsection (a) provides that EPA "may" establish a transport region and subsection (b)(1) only requires a transport commission upon the establishment of a transport region because "[w]henever the Administrator establishes a transport region under subsection (a) . . . , the Administrator shall establish a transport commission." Moreover, the relevant section 184 requirements apply to states within established *transport regions*. *See* 42 U.S.C. § 7511c(a)-(c). Thus, Industry/Labor petitioners cannot reason around the determinative statutory language contained in section 176A. Statutory construction is not an exercise in picking apart a complex statute and piecing the parts back together in a manner to effect a particular end. Ideally, a statute's directive concerning a certain issue will be plain and clear. Just so here.

B. State-Specific Analysis

Section 110(a)(2)(D)(I)(i) requires that the relevant offending emissions be "emissions activity within the State." Several petitioners charge that EPA did not sufficiently analyze each particular state in determining which states contributed unduly to ozone downwind.

In issuing its Notice of Proposed Rulemaking ("NPRM"), EPA relied on data collected from OTAG. The data were multi-state and regional in nature and were framed as a model of how ozone was transported downwind from 12 different regions that covered the eastern half of the United States. *See* Final Rule, 63 Fed. Reg. at 57,382. The OTAG regions do not track state boundaries, so several states are split between regions. EPA also relied upon the NO_x emissions of the individual states. *See id.* at 57,383-84. A potential shortcoming of the NPRM's approach was that it was too multi-state in nature. EPA knew how much NO_x each state was emitting, but a state's emissions as a share of total emissions do not necessarily correspond proportionately to its share in

the creation of ozone in downwind states. OTAG's multi-state modeling of such downwind transportation painted with a rather broad brush.

We need not pass judgment on whether the evidence and approach of the NPRM would have supported the final rule. After receiving comments regarding the insufficiently state-specific analysis of the NPRM, EPA performed state-specific modeling. *Id.* at 57,384. According to EPA, this confirmed the results of the regional modeling. *Id.*

The two types of state-specific modeling go by the names UAM-V and CAMx. In the UAM-V approach, the researchers model an affected downwind area to establish a base case, and then "zero-out" a particular source state. Thus with UAM-V it can be estimated what ozone concentrations would be like if a particular state contributed no ozone or ozone precursors. The CAMx modeling, on the other hand, is a source apportionment analysis which tracks modeled ozone from its precursors (NO_x and volatile organic compounds (VOCs)) through the formation of ozone and subsequent migration. Whereas UAM-V tells modelers how much ozone is missing when one state is zeroed out, CAMx models an ozone concentration and provides apportionment, i.e., who sent what. An advantage of the CAMx model used by EPA was that, unlike the UAM-V modeling, with CAMx EPA could isolate man-made emissions, or ozone creation based on reactions between man-made and biogenic emissions. UAM-V modeling was less discriminating.

Petitioners really do nothing more than quibble with the state-specific modeling. For example, Industry/Labor petitioners argue that zero-out modeling is inappropriate because it models an impossible scenario—the elimination of all man-made NO_x emissions; but they do not suggest how much this characteristic is likely to distort the results. State petitioners charge that sometimes the results of the two models were inconsistent, with, for example, the CAMx showing a larger

migration of ozone from a state than the UAM-V showed for all man-made NO_x in that state. EPA itself noted this infrequent inconsistency. *See id.* at 57,385. Neither criticism affords ground for non-expert judges to find a material likelihood of serious error. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 802 (D.C. Cir. 1998).

Petitioners complain that EPA did not provide the data sooner. EPA made the new modeling available on the Internet six weeks prior to the final rule, published its availability in the Federal Register a month before the final rule, and during that time received and responded to questions and comments regarding the modeling. Other than what we have already mentioned, petitioners have evidently not been able to identify further flaws in the modeling used, and thus have failed to show any prejudice from EPA's timetable. *Personal Watercraft Indus. Ass'n v. Department of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995).

C. Determining "Significant" Contribution

Section 110(a)(2)(D)(i)(I) applies only to states that "contribute significantly" to nonattainment in a downwind state. Petitioners make essentially four arguments challenging EPA's determination of "significance": (1) EPA acted contrary to precedent; (2) EPA considered forbidden factors, namely, costs of reduction; (3) EPA irrationally imposed uniform NO_x controls on the states; (4) EPA's determination was so devoid of intelligible principles as to violate the nondelegation doctrine.

1. Past Precedent

Before the 1990 amendments to the Clean Air Act, § 110(a)(2)(E)(I) directed the EPA to insist on SIP provisions adequate to prevent sources within a state from emitting air pollution that would "*prevent attainment* or maintenance [of primary or secondary standards] by any other State." 42

U.S.C. § 7410(a)(2)(E) (1982) (emphasis added). In a number of decisions EPA found, with approval of the courts, that various emissions of a particular state, having a proportionate impact on some downwind state greater than the impacts involved here, did *not* meet that standard. *See New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988); *Air Pollution Control Dist. of Jefferson County v. EPA*, 739 F.2d 1071 (6th Cir. 1984); *New York v. EPA*, 716 F.2d 440 (7th Cir. 1983); *New York v. EPA*, 710 F.2d 1200 (6th Cir. 1983); *Connecticut v. EPA*, 696 F.2d 147 (2d Cir. 1982). According to the states, these decisions, and what they claim to be Congress's implicit endorsement in the 1990 amendments, bar EPA from regarding the ozone emissions here as "significant" within the meaning of § 110(a)(2)(D)(i)(I). Thus the states would equate the old standard—"prevent attainment"—with the new standard: "contribute significantly to nonattainment."

Nothing in the text of the new section or any other provision of the statute spells out a criterion for classifying "emissions activity" as "significant." Nor did EPA, under the then-existing provision, bind itself to any criterion. Further, given EPA's finding as to the cumulative effects of the pollutants that generate ozone, EPA might well be able to distinguish this case from the sulfur dioxide cases that the states have cited. *See* 63 Fed. Reg. at 57,359 ("The chemical reactions that create ozone take place while the pollutants are being blown through the air by the wind, which means that ozone can be more severe many miles away from the source of emissions than it is at the source."). But the states point to nothing suggesting any prior adoption by EPA of any binding concept of how much was too much, so the claim falls short at the threshold.

2. Consideration of costs

Petitioners claim § 110(a)(2)(D)(i)(I) does not permit EPA to take into consideration the cost of reducing ozone. The full

section provides that SIPs must contain provisions adequately prohibiting

> any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . *contribute significantly* to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added).

Before reviewing the petitioners' attacks we must first describe how EPA went about the business at hand. It first determined that 23 jurisdictions are "significant" contributors to downwind nonattainment. 63 Fed. Reg. 57,398. In making this listing EPA drew lines based on the magnitude, frequency, and relative amount of each state's ozone contribution to a nonattainment area. For example, in one calculation it looked at the number of NO_x parts per billion ("ppb") that a candidate state's emissions made to exceedances in specific downwind locations (examined as a proportion of those exceedances). Indiana was found to contribute at least 2 ppb to 4% of the 1-hour ozone exceedances in New York City, and was deemed a "significant contributor" to nonattainment there. On the other hand, Alabama, Georgia, Massachusetts, Missouri, South Carolina, Tennessee, and Wisconsin were not deemed "significant contributors" to New York City nonattainment because none of these states ever contributed more than 2 ppb to a 1-hour exceedance in that area. Although EPA looked at other measures, e.g., the percentage contribution of a state's emissions to total concentrations in a specified area, no one quarrels either with its use of multiple measures, or with the way it drew the line at this stage.

Although the dividing line was a very low threshold of contribution, in the end EPA's rule called for termination of

only a subset of each state's contribution. EPA decided that the 23 "significant contributors" need only reduce their ozone by the amount achievable with "highly cost-effective controls." 63 Fed. Reg. at 57,403. Thus, once a state had been nominally marked a "significant contributor," it could satisfy the statute, i.e., reduce its contribution to a point where it would not be "significant" within the meaning of § 110(a)(2)(D)(i)(I), by cutting back the amount that could be eliminated with "highly cost-effective controls." EPA's design was to have a lot of states make what it considered modest NO_x reductions, uniformly limited to ones that could be achieved (in EPA's estimate) for less than $2000 a ton. As a result, naturally, the ultimate line of "significance," whether measured in volume of NO_x emitted or arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs.

State and Industry/Labor petitioners argue that this approach runs afoul of § 110(a)(2)(D), which they read as prohibiting any consideration of costs or cost-effectiveness in determining what contributions are "significant." So far as appears, none of the states proposes that EPA, if reversed, must require complete extirpation of their NO_x emissions. Rather, the gamble—at least of the small contributors—is evidently that if EPA were barred from considering costs, it would never have included such states. Because the attacks from the states and Industry/Labor are somewhat dissimilar and have shifted back-and-forth between the opening briefs, reply briefs, and oral argument, a summary of the relevant differences and vacillations is in order. We note that no party makes any claim that EPA was either confined to adopting rules whose benefits exceeded their costs, or permitted to use

that criterion in selecting its final rule.[2] Nor has it been argued that the term "significant" required consideration of costs.

State petitioners initially argued that it was "arbitrary and unlawful" for EPA to make cost effectiveness a "controlling factor" or "linchpin" in the determination of significant contribution under § 110(a)(2)(D). Thus EPA's error, as the states would have it, was in considering costs too much: "Petitioning States do not claim that there is no role for cost considerations; Petitioning States simply stress that EPA must establish a definition of significance that is dominated by air quality factors, as air quality is the sole factor mentioned in the statute." Reply Br. of Petitioning States at 4. In support of this position, State petitioners cited our en banc decision in *Natural Resources Defense Council v. EPA,* 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc), where we held that a statutory mandate for EPA to set a standard with an "ample margin of safety to protect the public health" did not preclude the consideration of costs and technological feasibility, but that these concerns could not be the "primary consideration."

At oral argument, counsel for the states abandoned this position and decided that the statute flatly prohibits EPA from

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[2] Indeed, accepting EPA's belief that ozone cannot be held responsible for mortality effects, *see* Proposed Rule, 62 Fed. Reg. at 60,321 (not listing death as a health effect of groundlevel ozone); compare Final Rule, 63 Fed. Reg. at 57,359 (listing "[p]ossible long-term damage to the lungs or even premature death" as health effects), and mainly using EPA data, some outside observers have calculated the benefit per ton of NO_x reduction as ranging from a high of $750 per ton (for mobile sources in certain areas) to a low of negative $6 per ton (for other mobile sources). Alan Krupnick & Virginia McConnell, "Cost-Effective NO_x control in the Eastern U.S." (Draft July 1999) (Table 4); *see* Krupnick & Anderson, *A Dilemma Downwind,* 137 Resources for the Future 5, 7 (1999) ("If one assumes that ozone does not cause deaths, the EPA's proposal is much too restrictive, incurring costs far out of proportion with the benefits it would bring.").

considering costs at all. Transcript of Oral Argument at 14-17. Indeed, counsel eventually went so far as to claim that if faced with two states, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost of less than $5000 a ton, EPA must mandate the same cutback for each. *Id.* at 16-17.

We should note here that the consequence of this position is not so extreme as it sounds. EPA's rule allows ton-for-ton emissions trading between firms based on allowances determined by each state. *See* 63 Fed. Reg. 57,456. Obviously the firms with the highest emission reduction costs will, if permitted by their states, buy up pollution allowances from firms that are granted allowances because they have over-controlled for NO_x—firms, obviously, with low reduction costs. If transaction costs were zero, the only effect of the initial assignment of cutbacks would be distributional: firms would make only the cheaper cutbacks, but firms with high emission-reduction costs would buy allowances from those with low costs and thereby transfer wealth to them. *See* Ronald H. Coase, *The Problem of Social Cost,* 3 J. L. & Econ. 1 (1960). But transaction costs notoriously are not zero;[3] so the likely effect of the proposed statutory interpretation would be that any aggregate cutback would be achieved at considerably higher cost than under EPA's reading of § 110(a)(2)(D)(i)(I), with absolutely no offsetting environmental benefit to the public. Of course we are able to assume the existence of EPA's allowance trading program only because no one has challenged its adoption. As the program seems to have no rationale other than cost reduction, *see* 63 Fed. Reg. at 57,457, it would presumably be invalid under petitioners' proposed reading of § 110(a)(2)(D)(i)(I), in

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[3] A glance at EPA's regulations for allowance trading will convince any doubter that transaction costs can safely be expected to be substantial. *See* 63 Fed. Reg. at 57,457-75.

which case the states' position really is as extreme as it sounds.

Returning to the positions of the parties, we find Industry/Labor engaging in a migration comparable to that of the states, though in the opposite direction. In its opening and reply brief Industry/Labor argued that "§ 110(a)(2)(D) requires consideration of only air quality impacts in determining the significance of any contribution." However, at oral argument Industry/Labor offered a construction of the statute that seemed to restore to EPA via § 110(k)(5) what it would take away via § 110(a)(2)(D). Industry/Labor claimed that costs could be considered when EPA determines if a SIP is "adequate" under § 110(k)(5). Transcript of Oral Argument at 28. The states actually offered this same reading of § 110(k)(5) in their reply brief (back when they thought EPA could consider costs) but appeared to abandon it at oral argument in favor of a flat prohibition on EPA cost considerations. The argument that costs may be considered under § 110(k)(5) seems to concede that the structure of the statutory scheme manifests no intention to bar the consideration of costs.

And so we are indeed presented with the question whether § 110(a)(2)(D) bars consideration of costs, but it is presented to us with the caveat that costs can be considered later on in the process, and accompanied by a false start by the states, who initially said that EPA could consider costs, just not too much. Against this backdrop, it would be at the very least ironic for us to say there is "clear congressional intent to preclude consideration of cost" under § 110(a)(2)(D). *See Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (en banc).

For convenience we repeat the statutory language. Section 110(a)(2)(D)(i)(I) provides that SIPs must contain provisions adequately prohibiting

> any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . *contribute significantly* to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). By its terms the statute is focused on "amounts" of "emissions activity" that "contribute significantly to nonattainment." The fundamental dispute is over the clarity of the phrase "contribute significantly." Must EPA simply pick some fiat "amount" of contribution, based exclusively on health concerns, such that any excess would put a state in the forbidden zone of "significance"?[4] Or was it permissible for EPA to consider differences in cutback costs, so that, after reduction of all that could be cost-effectively eliminated, any remaining "contribution" would not be considered "significant"? In deciding on the permissible ceiling, EPA used "significant" in the second way.

The term "significant" does not in itself convey a thought that significance should be measured in only one dimension—here, in the petitioners' view, health alone. Indeed, "significant" is a very odd choice to express unidimensionality; consider the phrase "significant other." In some contexts, "significant" begs a consideration of costs. In finding a threshold requirement of "significant risk" in § 3(8) of the Occupational Health and Safety Act, 29 U.S.C. § 652(8), a plurality of the Supreme Court understood a "significant" risk as something more than a "mathematical straitjacket," and held that "[s]ome risks are plainly acceptable and others are plainly unacceptable." *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*

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[4] We deal below with a related question: Did EPA act irrationally in setting the level of significance without regard for varying levels of downwind impact? *See* part I.C.3 below.

("*Benzene*"), 448 U.S. 607, 655 (1980) (plurality opinion). The plurality withheld judgment on whether the Act required a "reasonable correlation between costs and benefits," *id.* at 615, but the upshot of inserting the adjective "significant" was a consideration of which risks are worth the cost of elimination. OSHA has since interpreted § 3(8) and regulation of "significant risk" to require "cost-effective protective measures" and set standards with an eye toward "the costs of safety standards [being] reasonably related to their benefits." *See International Union v. OSHA* (*Lockout/Tagout II*), 37 F.3d 665, 668-69 (D.C. Cir. 1994) (quoting OSHA's final rule). OSHA's reaction to the term "significant" seems to confirm what some commentators have asked rhetorically: "[C]an an agency sensibly decide whether a risk is 'significant' without also examining the cost of eliminating it?" Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein & Matthew L. Spitzer, ADMINISTRATIVE LAW AND REGULATORY POLICY 65 (4th ed. 1999).

Petitioners conspicuously fail to describe the intellectual process by which EPA would determine "significance" if it may consider only health. EPA has determined that ozone has *some* adverse health effects—however slight—at every level. *See* National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997). Without consideration of cost it is hard to see why *any* ozone-creating emissions should not be regarded as fatally "significant" under § 110(a)(2)(D)(i)(I). Perhaps EPA might (under such a rule) let the upwind states off at the stringency level of the programs imposed on non-attainment areas, but petitioners do not explain how "significance" can exclude cost but admit equity.

Although the ambiguity of the word "significant" and the implications of a health-only reading are potentially fatal flaws in petitioners' theory (aside from their own inability to discern the "plain language" consistently), the most formidable obstacle is the settled law of this circuit. It is only where

there is "clear congressional intent to preclude consideration of cost" that we find agencies barred from considering costs. *NRDC*, 824 F.2d at 1163; *see also George E. Warren Corp. v. EPA*, 159 F.3d 616, 622-24 (D.C. Cir. 1998), *reh'g granted*, 164 F.3d 676 (D.C. Cir. 1999); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 2046 (1999); *NRDC v. EPA*, 937 F.2d 641, 643-46 (D.C. Cir. 1991); *cf. International Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1528-29 (D.C. Cir. 1984) (construing mandate to adopt "reasonable requirements" for safety as allowing consideration of cost).

In *NRDC* we considered § 112 of the Clean Air Act, requiring EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the public health. We held that this phrase did not preclude a consideration of costs. 824 F.2d at 1155, 1163. In *George E. Warren Corp.* we acknowledged that the statutory scheme for the reformulated gasoline program had the "overall goal" of improving air quality and "reducing air pollution." 159 F.3d at 622. But because there was nothing "in the text or structure of the statute to indicate that the Congress intended to preclude the EPA from considering the effects a proposed rule might have upon the price and supply of gasoline," *id.* at 623, we found no such preclusion even though the provision at issue contained no allusion whatever to such effects. Similarly, in *Grand Canyon Air Tour* the statute required the FAA to devise a plan for "substantial restoration of the natural quiet" in the Grand Canyon area, but we found nothing impermissible in the FAA's consideration of costs to the air tourism industry in deciding how "substantial" that restoration must be. 154 F.3d at 475. In *NRDC v. EPA* we considered whether EPA permissibly used cost-benefit analysis in refusing to classify a particular polluting source as "major." The petitioners argued that cost considerations were precluded, and we stated: "[W]hile the statutory language and legislative history do not bar petitioners' construction, they

provide little support and no necessity for it." 937 F.2d at 645. We affirmed EPA's use of cost-benefit analysis.

These cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction. *See* Edward W. Warren & Gary E. Marchant, *"More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts*, 20 Ecology L.Q. 379, 421 (1993) ("The need to compare benefits and costs has long played a role in judicial review of agency actions regulating health and safety risks."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 487 (1989) (suggesting an "interpretive principle" drawn from case law, including *NRDC v. EPA*, 824 F.2d 1146, that reviewing courts will read statutes as authorizing regulations with benefits at least "roughly commensurate with their costs, unless there is a clear legislative statement to the contrary"). Three of the cases, moreover—the two *NRDC* cases and *Grand Canyon*—, involve statutory language with just the same structure as here. A mandate directed to some environmental benefit is phrased in general quantitative terms ("ample margin of safety," "substantial restoration," and "major"), and contains not a word alluding to non-health trade-offs; in each case we found that in making its judgments of degree the agency was free to consider the costs of demanding higher levels of environmental benefit. So too here.

Petitioners point to no evidence of the requisite "clear congressional intent to preclude consideration of cost." *NRDC*, 824 F.2d at 1163. The text, we have already seen, works no such preclusion. As for the statutory structure, petitioners willingly concede that costs may be considered under § 110(k)(5) in determining the adequacy of a state plan. Why would a Congress intent on precluding cost considerations allow such an escape hatch? The petitioners cite no

legislative history suggesting that cost considerations should be barred.

In sum, there is nothing in the text, structure, or history of § 110(a)(2)(D) that bars EPA from considering cost in its application.

3. Uniform Controls

As we have seen, EPA required that all of the covered jurisdictions, regardless of amount of contribution, reduce their NO_x by an amount achievable with "highly cost-effective controls." Petitioners claim that EPA's uniform control strategy is irrational in two distinct ways. First, they observe that where two states differ considerably in the amount of their respective NO_x contributions to downwind nonattainment, under the EPA rule even the small contributors must make reductions equivalent to those achievable by highly cost-effective measures. This of course flows ineluctably from the EPA's decision to draw the "significant contribution" line on a basis of cost differentials. Our upholding of that decision logically entails upholding this consequence.

The second objection is that because of distance and the vagaries of pollutant migration and ozone formation, a molecule of NO_x emitted in Indiana (for example) may cause far less adverse health impact than a molecule emitted in eastern Pennsylvania. EPA acknowledges that "[s]ources that are closer to the nonattainment area tend to have much larger effects on air quality than sources that are far away." 63 Fed. Reg. at 25,919. While EPA's cost-effectiveness standard and emissions trading seem to mean that EPA will secure the resulting aggregate NO_x reduction at roughly the lowest possible cost, they do not necessarily mean that it will have secured the resulting aggregate health benefits at the lowest cost. Petitioners ask, in effect, why EPA did not, by one means or another (e.g., in the emissions trading system),

make reductions from sources near the nonattainment areas (or otherwise more damaging, molecule for molecule) more valuable than ones from distant sources?

EPA considered this approach, modeling the efficacy of regional alternatives compared to its uniform strategy. *See* Final Rule, 63 Fed. Reg. at 57,423. Its researchers found that non-uniform regional approaches by comparison did not "provide either a significant improvement in air quality or a substantial reduction in cost." *Id.* The complaining states offer no material critique of EPA's methodology in reaching this answer, which in fact some independent investigators have confirmed. *See* Krupnick & Anderson, *A Dilemma Downwind,* 137 Resources for the Future 5, 6 (1999) ("[Even with] spatial differences, when viewed across the entire study region, RFF concluded that there was no clear benefit to an exposure-based trading system, compared with simple ton-for-ton NO_x trading. Public health benefits would be approximately the same, and there would be no significant difference in costs to the utilities."). We have no basis to upset EPA's judgment.

4. Nondelegation

In their opening brief and more prominently in their reply brief, state petitioners argue that EPA has not determined "significant contribution" based on any intelligible principles. Petitioners rely heavily on our decision in *American Trucking Ass'ns, Inc. v. EPA,* 175 F.3d 1027, *reh'g granted in part, den'd in part* 195 F.3d 4 (D.C. Cir. 1999), essentially arguing that nothing about EPA's analysis explains how much of a NO_x contribution was too much (i.e., worthy of a SIP call).

We must recognize here that EPA's cost-effectiveness criterion is a radically incomplete line-drawing device. EPA has effectively ruled that each affected state must get down to the NO_x emissions levels that would prevail if it removed all NO_x emissions costing $2000/ton or less to remove. This

satisfies its "cost-effectiveness" criterion because (if states also seek to minimize costs subject to the EPA's constraint) only these relatively low-cost tons will be removed. But while EPA indicates that it rested the $2000/ton figure on "$NO_x$ emissions controls that are available and of comparable cost to other recently undertaken or planned NO_x measures," Final Rule, 63 Fed. Reg. at 57,400, it neither rests that benchmark on anything in the language or function of § 110(a)(2)(D)(i)(I), nor otherwise explains why the resulting cut-off point represents the right degree of "cost-effectiveness" (i.e., why "highly cost-effective" should be at that "height"). Accordingly, we must read EPA as having understood that its selection of the cut-off point was essentially unbounded.

But petitioners have ignored a limit to the nondelegation doctrine that we relied on in *American Trucking* and even more emphatically in its immediate precursor, *International Union, UAW v. OSHA ("Lockout/Tagout I")*, 938 F.2d 1310 (D.C. Cir. 1991). There we noted that the scope of the agency's "claimed power to roam" was "immense, encompassing all American enterprise." *Id.* at 1317. Quoting verbatim from *Synar v. United States*, 626 F. Supp. 1374, 1383 (D.D.C. 1986) (three-judge panel), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986), we said, "When the scope increases to immense proportions, as in [*A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935)], the standards must be correspondingly more precise." *Lockout/Tagout I*, 938 F.2d at 1317. We noted that a mass of cases in courts had upheld delegations of effectively standardless discretion, and distinguished them precisely on the ground of the narrower scope within which the agencies could deploy that discretion. *Id. American Trucking*, perhaps too succinctly for petitioners to notice, incorporated the *Lockout/Tagout I* discussion of the point. *American Trucking*, 175 F.3d at 1037.

Nominally, of course, § 110(a)(2)(D)(i)(I) encompasses "all American enterprise." But as a practical matter EPA must make a number of threshold determinations that in practice appear to have confined the statute to a modest role. Before assessing "significance," EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment. We do not mean to minimize the scope of EPA's action in the present case. Nearly half of the nation is affected and control costs will be substantial. And it may ultimately prove that the dam constituted by these criteria will burst, subjecting "all American industry" to EPA's § 110(a)(2)(D)(i)(I) discretion. But in practice, so far, these threshold criteria appear to have so limited EPA's activity under the section as to make the rule in question here the sole example of § 110(a)(2)(D)(i)(I) rulemaking. Accordingly, the grounds on which we remanded in *Lockout-Tagout I* and *American Trucking* for confining agency constructions are absent here.

II. *Inclusion of Specific States*

A. Wisconsin

Wisconsin industry petitioners separately challenge Wisconsin's inclusion in the SIP call. The Wisconsin petitioners argue that the emissions from the state do not contribute significantly to nonattainment in any other state. Section 110(a)(2)(D)(i)(I) requires that a state "contribute significantly to nonattainment in . . . *any other State*" in order to be included in the challenged SIP call. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). As explained below, EPA erroneously included Wisconsin in the SIP call because EPA failed to explain how Wisconsin contributes to nonattainment *in any other state*.

EPA contends that Wisconsin contributes significantly to other states' nonattainment because the state significantly contributes ozone over the Lake Michigan region. Despite EPA's Lake Michigan concerns, the agency does not show on the record that Wisconsin's ozone contribution affects any onshore state nonattainment. At oral argument, counsel for EPA conceded that "[t]he part that's missing [from the record] is a thorough explanation to support our modeling data and things of that nature between the Lake Michigan receptor area and the onshore states." Oral Arg. Tr. at 107. When asked for more, counsel could only respond that "the best evidence . . . is simply the narrative statements in the [final rule's] preambles . . . . There's nothing else there." *Id.* Because EPA conceded at oral argument that it has no record evidence directly linking Wisconsin's ozone contribution over Lake Michigan to nonattainment in any *state* and because EPA must "demonstrate[ ] a reasonable connection between the facts on the record and its decision" made pursuant to its statutory authority, *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995), we hold that EPA acted unlawfully by including Wisconsin in a SIP call limited by statute to states contributing significantly to nonattainment in any other state and therefore set aside Wisconsin's inclusion in the SIP call. *See* 5 U.S.C. § 706(2)(A), (C) (1994) ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not accordance with law [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.").

B. Missouri and Georgia

Missouri and Georgia were on the geographical perimeter of EPA's SIP call. No state west of Missouri was included, nor were the two states directly to its north (Iowa and Minnesota) and south (Arkansas). Georgia was a bit more in the thick of things, surrounded on three sides by included

states—Alabama, Tennessee, North Carolina, and South Carolina; but the southern portion of Georgia borders the excluded state of Florida. Industrial petitioners within Missouri and Georgia challenge EPA's decision to calculate NO_x budgets for these two states based on the entirety of NO_x emissions in each state. Petitioners argue that there is record support only for the proposition that emissions from, roughly speaking, the eastern half of Missouri and the northern two-thirds of Georgia "contribute" to downwind concentrations; accordingly, they say, the NO_x budgets for Missouri and Georgia should be based solely on those emissions.

We must here explain how EPA calculated NO_x budgets. It projected the total amount of NO_x emissions that sources in a state would emit in the year 2007, in light of expected growth and other controls required by the CAA. EPA then projected total NO_x emissions if "highly cost-effective controls" were implemented. The resulting calculation became the state's NO_x budget, with the difference between the base case and the controlled case being the "significant" contribution discussed above. Obviously a state's NO_x budget will vary depending on whether EPA considers all of the NO_x emissions in the state, or instead considers only emissions located in a smaller portion of the state (assuming emissions are dispersed throughout the state, which is the case here and without which the issue would be immaterial, as nonexistent emissions need not be controlled). For Missouri and Georgia, as for all other included states, NO_x budgets were calculated using all NO_x emissions in the state.

The challenge basically stems from the character of OTAG's modeling, and its resulting recommendations to EPA. OTAG's ozone transport model used grids drawn across most of the eastern half of the United States. The first grid was the most precise, with grid cells of 12 kilometers squared (244 square kilometers)—the "fine grid." A second grid extended beyond the perimeter of the fine grid and had

cells of 36 kilometers squared resolution—the "coarse grid." For a variety of reasons to be discussed shortly, the fine grid did not track state boundaries, and Missouri and Georgia were among several states that were split between the fine and coarse grids. OTAG then ran modeling for both grids, but in the final analysis did not find emissions from the coarse grid worthy of special concern. OTAG's executive summary stated: "[T]he focus on ozone air quality impacts in the fine grid raised questions about the need for controls in the coarse grid. The recommendations adopted by the Policy Group recognize that the OTAG analyses demonstrated that transport impacts of the coarse grid areas on the fine grid are minimal and therefore, do not include the coarse grid areas for recommended control measures other than those that would be applied nationally." Petitioners argue that EPA should base NO_x budgets for Missouri and Georgia only on portions of these states within the fine grid.

EPA offers three reasons for including the entire states of Missouri and Georgia:

> (1) The division of individual States by OTAG was based, in part, on computational limitations in OTAG's modeling analyses; (2) the additional upwind emissions from full, as opposed to partial, States would provide additional benefit to downwind nonattainment areas; and, (3) State-wide emissions budgets create fewer administrative difficulties than a partial-State budget.

Final Rule, 63 Fed. Reg. at 57,424. We review deferentially, searching for the reasonableness of EPA's action, *Appalachian Power,* 135 F.3d at 802, whether that be EPA's interpretation of the statute, *see Chevron,* 467 U.S. at 842-43, or EPA's explanation for its policy choice, *see Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). The two inquiries can and do overlap. *See Animal Legal Defense Fund v. Glickman,* No. 97-5009, slip op. at 9 (D.C. Cir. Feb. 1, 2000).

On its face the statute neither mandates nor prohibits an all-or-nothing statewide perspective. It directs EPA to make sure that SIPs (which of course are *state* plans) adequately prohibit "any source or other type of emissions activity within the State from emitting" in excess of the substantive limit. The critical issue is whether the targeted "source" or "emissions activity" "contribute[s] significantly to nonattainment" in another state.

EPA's first argument is that the fine grid split Missouri and Georgia in part because of computer limitations—every extension of the fine grid modeling was costly in terms of both computer memory and data collection. Document No. II-A-14, Draft OTAG Final Report Regional and Urban Scale Modeling—Chapter 2, 2-7 (undated). But the OTAG modelers allocated their scarce resources purposefully, by reference to known air quality data, explicitly taking into consideration the "locale of various problem areas (as represented by urban-area modeling domains), and emissions density." *Id.* Thus it was no mere techno-fortuity that the fine grid included enough of Missouri to include the city of St. Louis and enough of Georgia to include Atlanta: both cities are designated nonattainment areas for ozone under the 1-hour NAAQS. *See* Final Rule, 63 Fed. Reg. at 57,359. Moreover, the fine grid portions of both states are the closest to other nonattainment areas, such as Chicago and Birmingham, and generally higher ozone density.

Of course the fine grid modeling of *parts* of Missouri and Georgia showed emissions in the aggregate meeting the EPA's threshold "contribution" criteria. Thus fine grid modeling of each in its entirety would presumably also have done so. But that is a simple arithmetic necessity (a state is necessarily composed of its parts) and provides no reason for EPA to ignore the very air quality factors that influenced the design of the modeling that did occur. OTAG itself clearly did not think those factors magically lost their force, for it

recommended against controlling the rump areas. And EPA itself acknowledged part of the reason this should be so when it observed, "Sources that are closer to the nonattainment area tend to have much larger effects on air quality than sources that are far away." 63 Fed. Reg. at 25,919. Indeed, even if the line between areas for which there was evidence and ones for which there was none were explained solely by fortuity, EPA would still be required to act upon the evidence that *was* generated. *See Chemical Manufacturers Ass'n v. EPA*, 859 F.2d 977, 989 (D.C. Cir. 1988) (holding that EPA must consider "all the evidence—including the industry evidence").

This leads us to EPA defenses other than modeling design. The first is that "the larger the geographic area that is controlled, the greater the downwind benefits." Final Rule, 63 Fed. Reg. at 57,424. This reason can only stand if the emissions at issue contribute significantly to nonattainment in another state. OTAG concluded they did not. *Id.* EPA claims that its state-specific modeling, which supplemented OTAG's more regional modeling, supports including the coarse grid areas. *See id.* Yet EPA's explanation and technique make clear that emissions from the fine grid areas may have been the sole source of the finding. Indeed, EPA says as much: "[I]f emissions from part of a State contribute significantly to downwind nonattainment or maintenance problems, emissions from the entire State contribute significantly to downwind nonattainment or maintenance problems." *Id.* This of course is also true as a matter of logic (a state is the sum of its parts). But it is completely consistent with the rump portion being innocent of downwind effect, and thus is scarcely a *reason* for ruling that significant contributions from a border city should rope in the entire state.

Aware of this problem, EPA simply throws the burden of persuasion onto the states. "[T]here is no peculiar meteorological phenomenon that would indicate that emissions from

some portion of [each of the affected states] would not impact downwind nonattainment or maintenance problems." *Id.* In addition, "the atmosphere is constantly in motion and has no limitations at geo-political boundaries." *Id.* If this is "evidence" of contribution, it proves too much. If the simple proposition that the prevailing westerlies carry pollutants eastward were enough, EPA could, on the basis of a plant in Pennsylvania, use § 110(a)(2)(D)(i)(I) to control all NOx emissions east of the Rocky Mountains. While we uphold EPA's determination that a "significant" contribution is a cost-effectively controllable contribution, *EPA must first establish that there is a measurable contribution.* Interstate contributions cannot be assumed out of thin air.

In the end administrative convenience is EPA's only real defense for basing NOx budgets on the entirety of a state's emissions. There seem to be two species of this argument. First, EPA seems to claim that it is just easier to calculate a NO_x budget based on *all* the emissions in the state instead of only a portion of such emissions. EPA provides no explanation of why this is so, and it seems dubious. Within a state are counties, air quality control regions, and for some unfortunate states, nonattainment areas. EPA also has emissions data on specific sources, some of which may be susceptible of "highly cost-effective controls," and others of which may not be. *See, e.g.*, Emissions Data For Power Plants, <www.epa.gov/acidrain/emissions> (visited January 26, 2000). Without data from such state subdivisions and specific sources, EPA could never have performed modeling or even set a statewide budget. EPA has not explained how calculation of a budget for sources in only half of the state would be any more onerous than for all sources in the state. Unless it is relying on data that exist only for the state as a whole, calculation seems on its face easier for a half than for a whole.

EPA offers a second administrative problem. If the concern for not allowing § 110(a)(2)(D)(i)(I) to encompass unproven areas compels an insistence on proof of contribution from ever smaller geographic subdivisions, any area's specific contribution may appear insubstantial, even though collectively there are significant contributions. In other words, unlike bologna, which remains bologna no matter how thin you slice it, significant contribution may disappear if emissions activity is sliced too thinly.

While this argument was stressed on appeal, it is nowhere to be found in the proposed or final rule, except insofar as it may have lurked behind the vague invocation of "administrative difficulties." *See* Final Rule, 63 Fed. Reg. at 57,424; Proposed Rule, 62 Fed. Reg. at 60,342. As a result it is quite undeveloped. But it appears to be based on a distortion of the claims of Missouri and Georgia. They are not asserting a right to bologna tactics, to slice down the unit of measurement to a point of insignificance. All they are claiming is that where the data—calculated under EPA's supervision—inculpate part of a state and not another, EPA should honor the resulting findings.

Such a proposition would of course leave EPA free to select states as the unit of measurement. In turn, states (or the areas of states that believed themselves innocent of material contributions, or sources located therein), might respond by offering finer-grained computations. Such a process seems more like a healthy search for truth than the collapse into infinite regress that EPA claims to fear.

EPA also points to state flexibility: "Since each State has the flexibility to determine which sources to control in order to meet the budget, a State can structure its control strategy to require fewer reductions in certain portions of the State and greater controls in other areas." Final Rule, 63 Fed. Reg. at 57,424. This theory presents at least two difficulties. First, it overlooks the fact that state budgets not only encompass the

whole state but are calculated on the basis of hypothesized cutbacks from areas that have *not* been shown to have made significant contributions. Thus the "flexibility" comes at the cost of a burden that is heavier in the aggregate, where the added weight accomplishes *no* purpose relevant to § 110(a)(2)(D)(i)(I). Second, a state's use of flexibility to pursue a purely *in*-state set of tradeoffs between cost and benefit (and thus unrelated to the goals of §110(a)(2)(D)(i)(I)) may actually *diminish* the cutbacks in areas that are making a contribution to other states' nonattainment.

Thus nowhere has EPA reasonably explained why NO_x budgets based on every state source are the best stopping point with respect to states on the perimeter of the ozone problem.

Therefore we vacate EPA's final rule with respect to Missouri and Georgia and remand to the agency for reconsideration in light of this opinion.

C. South Carolina

Petitioner Santee Cooper challenges South Carolina's inclusion in the SIP call by alleging that the state's downwind ozone nonattainment impact is "minuscule" and therefore not significant. We will hold unlawful EPA's decision to include South Carolina in the SIP call if we find EPA's decision "arbitrary, capricious, an abuse of discretion, or otherwise not accordance with law." 5 U.S.C. § 706(2)(A). In order for EPA's decision to include South Carolina in the SIP call to survive review, the agency must "demonstrate[ ] a reasonable connection between the facts on the record and its decision," *Ethyl Corp.*, 51 F.3d at 1064. We conclude that the record supports EPA's decision to include the state as a significant contributor to downwind nonattainment. *See* Proposed Rule, 62 Fed. Reg. at 60,337-339. EPA considered the analyses submitted by the objecting petitioner but disagreed with the

petitioner's conclusions as drawn from the relevant information. Specifically, EPA conducted additional modeling and interpreted the data in context and found that South Carolina significantly contributed to ozone nonattainment. *See id.*; Final Rule, 63 Fed. Reg. at 57,394-396.

For example, under the 1-hour standard, the UAM-V zero-out modeling results indicated that South Carolina had a high maximum contribution (16 ppb) and a high frequency of contribution (at least 2 ppb to 15% of the exceedences and at least 10 ppb to 5% of the exceedences) to Atlanta. *See* OFFICE OF AIR AND RADIATION, U.S. ENVIRONMENTAL PROTECTION AGENCY, DOC. NO. VI-B-11, AIR QUALITY MODELING TECHNICAL SUPPORT DOCUMENT FOR THE NO_x SIP CALL C-5, H-2 (1998). The CAMx modeling results were comparable (25 ppb maximum contribution and a frequency of at least 2 ppb to 30% of the exceedences). *See id.* at C-5, G-6. Among the upwind states, only Alabama had a higher maximum contribution. *See id.* at Apps. G & H. Moreover, South Carolina's contribution to 1-hour nonattainment in Atlanta was no more "insignificant" than many of the other linkages that were found to be significant *(e.g.*, Indiana's contribution to New York City). *See id.* at C-13, H-16.

In contrast, the petitioner seeks to show that the data, when viewed in isolation, makes South Carolina's contribution appear insignificant. In the end, we reject the challenge made on behalf of South Carolina because the petitioner attacks, not so much the accuracy of EPA's data, but rather EPA's reasonable analysis and application of the data.

III. *Federalism and Regulatory Flexibility Act*

A. NO_x Budgets

Building on OTAG's work, EPA ordered the challenged SIP call under the authority of section 110(k)(5) in order to address significant contribution to 1-hour ozone nonattain-

ment as described under section 110(a)(2)(D).[5] In fashioning the SIP call, EPA focused on OTAG's determination that "[r]egional NO_x emissions reductions are effective in producing ozone benefits." Proposed Rule, 62 Fed. Reg. 60,318, at 60,320. EPA also took into consideration OTAG's conclusion that while NO_x controls are effective in addressing regional ozone problems, VOC controls are most effective locally and are most advantageous to urban nonattainment areas. *See id.* Because OTAG concluded that NO_x reductions provide the key to addressing regional ozone problems, EPA's SIP call addresses regional ozone nonattainment through NO_x emissions "budgets" established by the agency for each covered state. The budgets represent the amount of allowable NO_x emissions remaining after a covered state prohibits the NO_x amount contributing significantly to downwind nonattainment. *See* Final Rule, 63 Fed. Reg. 57,356, at 57,368. While EPA calculated the budgets using highly cost-effective emission controls, the agency allows the states to choose the control measures necessary to bring their emissions within the budget requirements. *See id.* at 57,377; *id.* at 57,400. Under EPA's budget plan, a state "may choose from a broader menu of cost-effective, reasonable alternatives" including alternatives that "may even be more advantageous in light of local concerns." *Id.* at 57,369-370. In fact, EPA has stated that the states have "full discretion in selecting the controls, so that [the states] may choose any set of controls that would assure achievement of the budget." *Id.* at 57,378. In addition, each state has the option of adopting an interstate trading program that allows it to purchase NO_x "allowances" from sources that have elected to over-control. *Id.* at 57,430. The SIP call also gives the states the option in some circumstances to use "banked" allowances *(i.e.* allowances from prior years) to comply with emissions limits. *See id.*

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[5] As noted above, we will not address the 8-hour portion of the SIP call.

Petitioners assert that EPA's NO_x budget program impermissibly intrudes on the statutory right of the states to fashion their SIP submissions in the first instance. In support of this position, the petitioners primarily rely on our decision in *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir.), *modified on other grounds*, 116 F.3d 499 (D.C. Cir. 1997), where we held that EPA may not use a section 110(k)(5) SIP call to order states to adopt a particular approach to achieving the SIP requirements listed in section 110. Under the rule at issue in *Virginia*, EPA required states to adopt California's vehicle emission program and in effect set the numerical emissions limitations and mandated the means for the states to achieve the necessary emissions reductions. That case involved an EPA rule that required several states to reduce ozone precursors by a particular program and only allowed states to implement a more stringent program as an alternative or substitute. We held that EPA's approach exceeded its authority under section 110 because each state retains the authority to determine in the first instance the necessary and appropriate control measures needed to satisfy section 110's standards. *See id.* at 1407-09 (citing *Train v. NRDC*, 421 U.S. 60, 78-79 (1975)).

Our holding in *Virginia* was mandated by the Supreme Court's decision in *Train v. NRDC*, 421 U.S. 60 (1975). *Train* involved a challenge to Georgia's procedures for revising source-specific emission limits adopted in a SIP. *See id.* at 68-71. The *Train* Court held that states have the authority under the CAA to initially propose specific emission limitations. *See id.* at 79. The Court defined "emission limitations" as "*regulations of the composition of substances* emitted into the ambient air from such sources as power plants, service stations, and the like. They are the *specific rules to which operators of pollution sources are subject*, and which if enforced should result in ambient air which meets the national standards." *Id.* at 78 (emphasis added). The Court further held that EPA has only "a secondary role in the

process of determining and enforcing the *specific, source-by-source* emission limitations." *Id.* at 79 (emphasis added). The *Train* decision and subsequent precedent make clear that section 110 left to the states "the power to [initially] determine *which sources* would be burdened by regulation and to *what extent*." *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) (emphasis added); *cf. Virginia*, 108 F.3d at 1399, 1401, 1408 (involving a source-specific program); *Riverside Cement Co. v. Thomas*, 843 F.2d 1246, 1247-48 (9th Cir. 1988) (citing *Train* and noting EPA's secondary role in enforcing source-by-source emissions limitations). As we elaborated in *Virginia*, "the Supreme Court decided . . . that [section 110] did not confer upon EPA the authority to condition approval of [a state's] implementation plan . . . on the state's adoption of a specific control measure." *Virginia*, 108 F.3d at 1408. For the reasons set forth below, we conclude that the NO_x budgets do not fall within the realm of impermissible SIP call regulation as defined in *Virginia* and *Train*.

Given the *Train* and *Virginia* precedent, the validity of the NO_x budget program underlying the SIP call depends in part on whether the program in effect constitutes an EPA-imposed control measure or emission limitation triggering the *Train-Virginia* federalism bar: in other words, on whether the program constitutes an impermissible source-specific means rather than a permissible end goal. However, the program's validity also depends on whether EPA's budgets allow the covered states real choice with regard to the control measure options available to them to meet the budget requirements.

Section 110(a)(2)(D) requires SIPs to contain adequate provisions prohibiting emissions from "any source or other type of emissions activity within the State" that "contribute significantly" to NAAQS nonattainment in another state. Here, EPA mandates that 22 states and the District of Columbia implement section 110(a)(2)(D) using its NO_x budget system. In essence, the NO_x budget in question is an EPA

mandate prohibiting NO_x emissions in the 23 jurisdictions from exceeding a tonnage specific to that jurisdiction. *See* 63 Fed. Reg. 57,356 at 57,491-493 (1998). Of concern to petitioners, the budget rule prohibits states from seeking compliance, in whole or part, by controlling VOC emissions even though VOCs as well as NO_x emissions contribute to ozone problems. *See, e.g., id.* at 57,359; *see also* 40 C.F.R. § 52.31(b)(7) (1998) (defining ozone precursors).

Yet, the budget plan's defining aspects do not necessarily cause the program to conflict with the limiting principles contained in *Train* and *Virginia*. Analyzing the budget rule together with the relevant precedent, we hold that based on section 110's silence, EPA reasonably interpreted section 110 as providing it with the authority to determine a state's NO_x significant contribution level and agree with EPA that the NO_x budget plan does no more than project whether states have reduced emissions sufficiently to mitigate interstate transport. *See* 63 Fed. Reg. at 57,368.

Under section 110, EPA must "approve a [SIP] submittal as a whole if it meets all of the applicable requirements of [the Act]." 42 U.S.C. § 7410(k)(3). While the states have considerable latitude in fashioning SIPs, the CAA "nonetheless subject[s] the States to strict minimum compliance requirements" and gives EPA the authority to determine a state's compliance with the requirements. *Union Elec. Co.*, 427 U.S. at 256-57 (referring to the requirements contained in the statute). Given EPA's authority to ensure that submitted SIPs adequately prohibit significantly contributing emissions, EPA permissibly relied on its general rulemaking authority to prospectively inform the states of EPA's significance determinations.

Moreover, EPA does not tell the states how to achieve SIP compliance. Rather, EPA looks to section 110(a)(2)(D) and merely provides the levels to be achieved by state-determined compliance mechanisms. Specifically, EPA set NO_x

reduction levels based, in part, on assumptions about reductions obtainable through highly cost-effective controls. *See* Final Rule, 63 Fed. Reg. at 57,426. However, EPA made clear that states do not have to adopt the control scheme that EPA assumed for budget-setting purposes. *See id.* at 57,369-370. States can choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels. *See, e.g., id.* at 57,438 (noting possibilities with regard to mobile sources); *id.* at 57,378 (noting possibilities with regard to stationary sources); *id.* at 57,416. While EPA bases the budgets here on "highly cost-effective" control measures, the states remain free to implement other "cost-effective" or "reasonably cost-effective" measures in place of the ones identified by EPA. *See id.* at 57,378; 63 Fed. Reg. 60,318 at 60,328 (1997) (noting that "one State may choose to primarily achieve emissions reductions from stationary sources while another State may focus on emissions reductions from the mobile source sector"). More importantly, EPA went so far as to give the states "full discretion in selecting . . . controls," 63 Fed. Reg. at 57,378, thereby allowing states to attain their budgets by imposing even quite unreasonable, very cost-ineffective controls. In *Virginia*, we did not bar EPA from permitting more costly alternatives but rather alternatives states would consider "unreasonable or impracticable." Here, EPA accommodates *Virginia's* mandate by allowing reasonable control alternatives and allowing states to focus reduction efforts based on local needs or preferences. *See* 63 Fed. Reg. at 57,369; *id.* at 57,399-405; 62 Fed. Reg. at 60,328. Thus, real choice exists for the covered states.

Regarding EPA's decision not to rely on VOC reductions, EPA reasonably concluded that long-range ozone transport can only be addressed adequately through NO_x reductions. Petitioners' reliance and emphasis on VOC reductions in lieu of NO_x reductions ignores the scientific basis for EPA's rule. OTAG and EPA concluded that VOC controls would not

effectively address interstate ozone transport. Furthermore, states can cure any NO_x reduction "disbenefits" with corresponding optional VOC controls. *See* 62 Fed Reg. at 60,344-345; 63 Fed. Reg. at 57,425. Thus, the SIP call cannot be invalidated merely because EPA reasonably chose not to regulate VOCs.

In sum, we conclude that EPA's NO_x budget program reasonably establishes reduction levels and leaves the control measure selection decision to the states. In addition, unlike the rule invalidated in *Virginia*, states implementing alternative control measures will not be penalized with more stringent emissions targets. Since the challenged budget program does not mandate a "specific, source-by-source emission limitation[ ]," the NO_x budget plan does not run afoul of *Train* or *Virginia*.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-612, as amended in 1996 by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), Pub. L. No. 114-121, Title II, 110 Stat. 847, 857-74, §§ 201-253 (codified at 5 U.S.C. §§ 601-612 (1994 & Supp. II 1996)), requires an agency, when proposing a rule for notice and comment, to "prepare and make available for public comment an initial regulatory flexibility analysis . . . . [that] describe[s] the impact of the proposed rule on small entities," 5 U.S.C. § 603(a), including small businesses, small organizations, and small governmental jurisdictions. *See id.* § 601(6). In addition, when promulgating a final rule, an agency must "prepare a final regulatory flexibility analysis" that describes, among other things, "a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues," and "the steps the agency has taken to minimize the significant economic impact on small entities." *Id.* § 604(a).

However, these analyses are not required if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." *Id.* § 605(b). In the instant case, EPA certified that the proposed and final rule will not have a significant economic impact on a substantial number of small entities and, accordingly, did not perform any regulatory flexibility analysis. *See* Final Rule, 63 Fed. Reg. at 57,478; Proposed Rule, 62 Fed. Reg. at 60,375. RFA petitioners contend that EPA's certification was improper and in violation of the RFA. We disagree.

The court has consistently held that the RFA imposes "no obligation to conduct a small entity impact analysis of effects on entities which it does not regulate." *Motor & Equip. Mfrs. Ass'n. v. Nichols,* 142 F.3d 449, 467 (D.C. Cir. 1998) (quoting *United Distribution Cos. v. FERC,* 88 F.3d 1105, 1170 (D.C. Cir. 1996)); *see also American Trucking,* 175 F.3d at 1044. Therefore, the key issue in evaluating EPA's § 605(b) certification is whether the NO_x SIP call "regulates" small entities.

EPA based its certification on its view that the NO_x SIP call "would not establish requirements applicable to small entities" because "it would require States to develop, adopt, and submit SIP revisions that would achieve the necessary NO_x reductions and would leave to the States the task of determining how to obtain those reductions, including which entities to regulate." Final Rule, 63 Fed. Reg. at 57,478. We agree with EPA's statement that the SIP call does not directly regulate individual sources of emissions. The instant case is thus analogous to *American Trucking,* which upheld EPA's certification under § 605(b) because the revised NAAQS at issue "regulate small entities only indirectly—that is, insofar as they affect the planning decision of the States." *American Trucking,* 175 F.3d at 1044. Therefore, we conclude that EPA's certification under § 605(b) is justified.

IV. *Remaining Claims*

A. Definition of "NO_x Budget Unit"

RFA petitioners also contend that EPA arbitrarily revised the definition of a "NO_x budget unit" to bring certain small sources within the scope of the core group of emission-producing sources to which the NO_x Budget Trading Rule ("model trading rule") applies.[6] This contention is meritless.

In the proposed rule, a "NO_x budget unit" was defined as a boiler that either serves electricity generators with a capacity greater than 25 megawatts ("MW") or does not serve generators but has a design heat capacity of greater than 250 million Btu/hr ("mmBTu/hr"). *See* Supplemental Notice for the Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone ("Supplemental Notice of Proposed Rule"), 63 Fed. Reg. 25,902, 25,978 (1998). EPA sought comment on "the appropriateness of including [such] categories . . . , whether the size cut-offs should be higher or lower for these source categories, and the appropriateness of including other source categories in the core group." *Id.* at 25,923. In the final rule, EPA discussed and revised the definition to expand the core group by including large boilers—those with design heat capacity of greater than 250 mmBtu/hr—even if they served

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[6] To assist states in meeting their budgets and to facilitate the most cost-effective reductions, the SIP call established a model rule for interstate trading of NO_x "allowances." Each state can choose whether to adopt the model rule, which will be administered by EPA, to adopt its own trading program, or to have no trading program at all. *See* Final Rule, 63 Fed. Reg. at 57,456-58.

The core group definition is used to set the minimum requirements that a State would have to include in its trading rule in order to participate in the EPA-managed multi-state trading program. *See id.* at 57,461. EPA viewed that setting such requirements was necessary for controlling the administrative costs of managing the trading program. *See id.*

generators with a capacity less than 25 MW. *See* Final Rule, 63 Fed. Reg. at 57,518. EPA explained that it was making this change in order to address the concern raised in the comments about excluding large boilers with high levels of emission just because they happen to serve small generators. *See id.* at 57,461.

EPA's revision is reasonable. The only argument that RFA petitioners seem to have against the change is that it contradicts EPA's statement elsewhere that "small electrical generators less than 25 MW . . . will be exempt under the final model rule." *Id.* at 57,463. It is unclear why this statement renders EPA's final action arbitrary. EPA's definition of a NO_x budget unit and the reasons for its change are set forth in the preamble to the final rule, and the most that the RFA petitioners have demonstrated is that EPA made at least one statement that was, as EPA concedes in its brief, "incomplete in that it did not address the case of large boilers with small generators." Such a minor oversight in the drafting of the preamble to the final rule does not render the substantive decision by EPA arbitrary.

B. Council of Industrial Boiler Owners

1. Introduction

In the rulemaking, EPA distinguished between electricity generating units ("EGUs") and non-electricity generating units ("non-EGUs"). Council of Industrial Boiler Owners ("CIBO"), a trade association whose membership consists of companies and universities operating industrial boilers and turbines ("industrial boilers"), which constitute one category of non-EGUs, challenges the NO_x SIP call for being based on the following arbitrary and capricious actions by EPA: EPA's failure to determine whether non-EGUs are significant contributors, EPA's flawed cost assumptions in its determination of cost-effective control measures for non-EGUs, EPA's erroneous calculation of non-EGU budgets, and EPA's

arbitrary redefinition of the term "EGU." We agree only that EPA's redefinition of EGUs was arbitrary and capricious.

2. Significant Contribution of Industrial Boilers

CIBO challenges EPA's decision to include non-EGU boilers in the rule without having isolated non-EGU emissions to determine whether they "significantly contribute" to the interstate ozone transport problem and whether implementing highly cost-effective emissions reduction measures on industrial boilers would ameliorate nonattainment in downwind states. CIBO maintains that non-EGU boilers typically have significantly shorter stacks than EGUs and that their emissions, as a result, fall below the "mixing layer" that promotes long-range NO_x transport. Therefore, CIBO contends, industrial boilers as a group can have no impact on long-range ozone transport. However, this factual claim fails in view of contrary evidence in the record. OTAG's Executive Report states as one of its major conclusions that "[b]oth elevated (from tall stacks) and low-level NO_x reductions are effective." Executive Report at 4. EPA reiterated this finding by OTAG in the NPRM, *see* Proposed Rule, 62 Fed. Reg. at 60,332, it relied on the finding, and it appears that members of CIBO never challenged it during the comment period. Therefore, we cannot say EPA's inclusion of non-EGUs in the group of significantly contributing sources was arbitrary.

3. Cost-Effectiveness Calculation for Industrial Boilers' Control Measures

CIBO also challenges EPA's conclusion that industrial boilers could achieve a 60% emissions reduction using highly cost-effective control measures, *see* Final Rule, 63 Fed. Reg. at 57,418, as based on flawed cost calculations. More specifically, CIBO lists the following alleged problems in EPA's cost assumptions:

—EPA's assumption of 10 years as the lifetime of all control measures for industrial boilers, except for selective

catalytic reduction and selective non-catalytic reduction controls, for which 20 years was assumed.

—EPA's use of a 10% discount rate, not 7%, in its cost-effectiveness analysis.

—EPA's failure to take into account the fact that control effectiveness can vary by as much as 10% to 20%.

—EPA's failure to take into account cost and feasibility implications of load variability and firing of multiple fuels.

—EPA's assumption of NO_x emission allowance costs of $2,000 per ton, when emission allowances trade for $5,500 to $6,300 per ton.

The general problem of these criticisms is that CIBO merely lists several items as problems and labels all of them "irrational" without explaining why its claims should concern the court. Given that almost all of CIBO's challenges involve technical details on which the court generally defers to the agency's expertise, CIBO's failure to explain why the so-called problems it identifies amount to an arbitrary and capricious decisionmaking is fatal to its claims.[7] Therefore, we reject CIBO's claims regarding EPA's underlying cost assumptions about industrial boilers.

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[7] For instance, the last item on the list, that it is arbitrary and capricious for EPA to assume NO_x emission allowance costs of $2,000 per ton when emission allowances now trade for $5,500 to $6,300 per ton, is insufficiently explained. Of course, if the firms in the market generating entitlement prices of $5,500 to $6,300 per ton were regulated at the same degree of stringency as EPA contemplates for firms expected to be burdened under the present rule, the market price would be strong evidence that compliance would cost far more than the $2,000 per ton figure that EPA has used. No one would pay $6,000 for an entitlement to emit a ton that he could remove at a cost of $2,000; the price of an entitlement could not exceed the marginal removal cost. But if the prices to which CIBO points arose among firms more stringently regulated, there would be no such contradiction. CIBO has not even endeavored to show equivalent stringency.

4. Determination of Non-EGU Component of State NO_x Budgets

CIBO contends that EPA's calculation of the non-EGU component for the State NO_x budget lacks adequate support in the record and lists the following as problems:

—Non-EGU inventories had errors.

—EPA's use of Bureau of Economic Analysis growth factor to project 2007 emission levels have "inherent error."

—EPA employed "crude extrapolations" to identify large non-EGU boilers.

—The "default boiler capacity file" is not in the record and the record does not reveal how EPA manipulated the data.

—The source of Bureau of Economic Analysis growth factors is not identified in the record, and the record does not show how EPA manipulated the data.

—It is unknown whether EPA credited NO_x reductions from fluidized-bed combustion technology.

Again, CIBO merely presents a list of problems without explaining why these alleged errors render EPA's rulemaking arbitrary or capricious. In addition, CIBO members had repeated opportunities to provide correct information for some of these items during the rulemaking process. CIBO's poorly articulated, blanket accusations at this late stage contribute little to improve the quality of agency rulemaking; therefore, we reject CIBO's challenges regarding EPA's calculation of NO_x budgets for non-EGUs.

5. Definition of EGU

More persuasively, CIBO contends that EPA revised the definition of "EGU" without adequate notice. Throughout the rulemaking, EPA defined an EGU as it did under the acid rain program, which excludes from the category of "utility units" those cogeneration units that sell less than one-third of

their potential electrical output capacity or less than 25 MW per year. *See* 42 U.S.C. § 7651a(17)(C). However, two months after the promulgation of the rule, EPA redefined an EGU as a unit that serves a "large" generator (greater than 25 MW) that sells electricity. CIBO contends that EPA did not provide sufficient notice and opportunity to comment on this revision, especially considering that the industrial boilers have relied on the previous definition for a number of years. We agree.

EPA maintains that it provided adequate notice in the May 1998 supplemental notice, stating that "deregulation of electric utilities" means that "it is not clear how ownership of the electricity generating facilities will evolve." Supplemental Notice of Proposed Rule, 63 Fed. Reg. at 25,923. Given that "there is no relevant physical or technological difference between utilities and other power generators," EPA proposed, "all large electricity generating sources, regardless of ownership," should be treated the same. *Id.* There are several problems with EPA's response. First, it is undisputed that EPA was departing from the definition of EGUs as used in prior regulatory contexts, and EPA was not explicit about the departure from the prior practice until two months after the rule was promulgated. Neither the proposed rulemaking in November 1997 nor the final rule in October 1998 introduced the new definition. EPA waited until the December 1998 correction notice to announce that it will "classify as an EGU any boiler . . . that is connected to a generator greater than 25 MWe from which any electricity is sold." Correction and Clarification to the Finding of Significant Contribution and Rulemaking for Purposes of Reducing Regional Transport of Ozone ("Correction Notice to Final Rule"), 63 Fed. Reg. 71,220, 71,223 (1998). After the December correction notice, EPA reopened the comment period for sixty days for comments on this and other issues. In EPA's May 1999 response to the comments, EPA, for the first time, discussed why the change was necessary and offered a justification

largely based on recent changes in the electric power industry. *See* Responses to the 2007 Baseline Sub-Inventory Information and Significant Comments for the Final NO_x SIP Call 10-12 (May 1999) ("Responses to Final Comments").

As to the statement in the May 1998 supplemental notice that EPA claims constitutes notice, this statement was given in EPA's discussion of how the core group of sources for the model trading rule should be defined, and not in the context of a discussion about the general distinction between EGUs and non-EGUs for the purposes of calculating state budgets. *Cf. Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 550 (D.C. Cir. 1983). Moreover, EPA also explicitly observed in the same May notice discussion about the model trading rule that "[m]any of the definitions . . . are the same as those used in . . . the Acid Rain Program regulations, in order to maintain consistency among programs." Supplemental Notice of Proposed Rule, 63 Fed. Reg. at 25,923. Given the vague and conflicting signals that EPA was sending, it is an exaggeration to state that some general "theme" of the regulatory consequences of deregulation of the utility industry throughout rulemaking meant that EPA's last-minute revision of the definition of EGU should have been anticipated by industrial boilers as a "logical outgrowth" of EPA's earlier statements. *See American Water Works Ass'n. v. EPA*, 40 F.3d 1266, 1274-75 (D.C. Cir. 1994).

EPA contends that even assuming that CIBO did not have adequate notice and opportunity to comment on the EGU definition, the error has been cured because it reopened the comment period on this issue after its announcement of the revision. *See* Correction Notice to Final Rule, 63 Fed. Reg. at 71,221-23. This response is to no avail. During the new comment period, some commenters complained that there had not been sufficient notice and opportunity to comment on the EGU redefinition. *See* Responses to Final Comment, at 12.

EPA's response to this charge primarily relied on the claim that there had been adequate notice prior to the redefinition, *see id.*, and we have already rejected that argument.

Therefore, we conclude EPA did not provide sufficient notice and opportunity to comment for its redefinition of EGUs and remand the rulemaking to EPA for further consideration in light of this opinion.

C. INGAA

Interstate Natural Gas Association of America ("INGAA"), a trade association that represents major interstate natural gas transmission companies in the United States, contends that EPA did not provide adequate notice and opportunity to comment on the control level assumed for "large" stationary internal combustion ("IC") engines in its determination of state NO_x budgets. We agree.

EPA's NPRM in November 1997 assumed a 70% control level for large IC engines, *see* Proposed Rule, 62 Fed. Reg. at 60,354, after considering and rejecting an 80% control level. *See id.* at 60,348. Then, in the supplemental notice in May 1998, EPA continued to assume the 70% control level. *See* Supplemental Notice of Proposed Rule, 63 Fed. Reg. at 25,908. EPA stated in the same notice that it "intends to further analyze" control approaches for IC engines and said that "[a]s the above analyses are completed, EPA intends to place them in the docket." *Id.* at 25,909. EPA did not present a new analysis until September 4, 1998, when it concluded that a 90% control level was more appropriate for large IC engines. *See* Technical Support Document for Stationary International Combustion Engines 2 (September 4, 1998). When the rule was finally promulgated in October 1998, EPA stated that it was assuming a 90% control level. *See* Final Rule, 63 Fed. Reg. at 57,418.

INGAA contends that EPA's switch from 70% to 90% for large IC engines was unanticipated and that EPA should have

allowed comments on the issue. Considering EPA's repeated affirmation of the 70% assumption throughout rulemaking and rejection of a higher, 80% assumption earlier, a revision in its assumption less than one month before the final rule was promulgated hardly provided adequate notice, especially given the magnitude of the consequences of the proposed change on the regulated bodies. Therefore, we remand for further consideration on this issue.[8]

In addition, INGAA challenges EPA's definition of large IC engines. EPA, in the final rule, distinguished between large and small sources by defining a "cutoff level." 63 Fed. Reg. at 57,414. EPA assumed no control for sources below the cutoff level and defined small sources as units with a capacity less than or equal to 250 mmBtu/hr and with emissions less than or equal to one ton per day. *See id.* at 57,415. EPA added that "EPA is relying on a capacity approach first and a tons per day approach second (where a capacity data is not available or appropriate)" to define small sources. *Id.* at 57,416. Then, in the December correction notice, EPA largely repeated the same methodology for determining the cutoff level, but added that "[a] stationary internal combustion engine and a cement plant were determined to be 'large' if its 1995 average daily ozone season emissions were greater than one ton." Correction Notice to Final Rule, 63 Fed. Reg. at 71,224.

INGAA contends that EPA did not follow its own standard in the correction notice and singled out IC engines and cement plants without explanation. Although EPA's various statements on this issue throughout rulemaking have not always been very clear or entirely consistent, EPA went

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[8] INGAA further contends that, even putting aside the notice issue, the documents that EPA relies on do not support EPA's assumption of 90% control level. Because we are remanding on the basis of the conclusion that there was inadequate notice, we do not reach the merits of the issue.

through an extensive comment period on this issue, *see* Final Rule, 63 Fed. Reg. at 57,415-17, and we agree with EPA that the change that INGAA criticizes for being arbitrary is merely a minor clarification that satisfies the reasonableness standard.

D. PP&L

1. EPA's Restrictions on Early Reduction Credits

PP&L, an electric utility that owns several generating stations in Pennsylvania, contends that EPA arbitrarily limited the number of "early reduction credits" ("ERCs"). We disagree.

Under the SIP call, a source can generate ERCs if it reduces its NO_x emissions before May 2003 to a level below that is required by any regulatory scheme. ERCs can then be used to compensate for emitting emissions above required levels in a later time period. *See* Final Rule, 63 Fed. Reg. at 57,430. EPA limited the amount of available ERCs for each state to the size of each state's compliance supplement pool ("CSP"). *See id.* at 57,474. The CSP is an additional allowance of emissions that allows states to emit 200,000 tons of NO_x in the 2003-2004 ozone seasons over the state emissions budgets. *Id.* at 57,428. EPA created the CSP in response to the comments that if all utilities had to install pollution control equipment by May 1, 2003, there might be disruptions in electricity supply. *See id.* If a state chooses to use the CSP, it can either provide ERCs or distribute the allowances to sources that demonstrate a need for the compliance supplement. *See id.* at 57,429-30.

PP&L contends that imposing this limit on the number of ERCs is arbitrary and capricious because placing any limit on ERCs is environmentally counterproductive. We do not find this contention persuasive. EPA noted during the comment period that ERCs, although generally beneficial, can be costly in that they allow states to exceed their budgets. *See* Responses to Significant Comments on the Proposed Finding of

Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group (OTAG) Region for Purposes of Reducing Regional Transport of Ozone 346 (September 1998) ("Responses to Comments"). EPA noted further that the CSP, by establishing a cap on the number of allowances to be distributed, limited such potential costs. *Id.* EPA's decision is thus reasonable.

PP&L also contends that EPA has not demonstrated why the "flow control mechanism" is not sufficient to address its concern. Under the flow control mechanism, the use of banked allowances exceeding 10% of the emissions budget for sources in the trading program is either flatly prohibited or discouraged by discounting the value of ERCs used as such, and states can choose between either method. *See* Final Rule, 63 Fed. Reg. at 57,431-32. This complaint by PP&L overlooks the fact that EPA included the flow control mechanism in the regulatory scheme "[a]s a final safeguard limiting the impact of additional allowances eligible for banking in the system." Responses to Comments, at 346. Therefore, it was a safeguard created in addition to the CSP limitation. It was within EPA's discretion to devise multiple limitations to contain the environmental cost of ERCs.

PP&L further contends that, even if it is rational for EPA to place a limit on the amount of ERCs, EPA's choice of setting the limit at the same amount as the CSP is arbitrary and capricious. This contention fails as well. The record shows that EPA allowed ERCs merely as a mechanism for managing the CSP, not as an independent program with a purpose separate from that of the CSP. *See* Final Rule, 63 Fed. Reg. at 57,428-33. Therefore, EPA's decision to limit the amount of ERCs to the size of the CSP was reasonable.

2. Emissions Multiplier for Low Mass Emission Units

PP&L also contends that EPA arbitrarily required "low mass emission units" ("LMEUs") to use a 15% multiplier to calculate their emissions. We disagree.

EPA allows LMEUs either to use a generic default NO_x or to determine a unit-specific NO_x emission rate by conducting a stack test once every five years. Because EPA found that the stack test results can vary by 15% or more depending on atmospheric conditions, EPA requires an LMEU to calculate its emissions rate by adding 15% to the stack test result. *See* Final Rule, 63 Fed. Reg. at 57,490.

PP&L contends that this is unreasonable because EPA has stated that the testing would likely underestimate emissions during cooler less humid conditions. *See id.* PP&L reasons that because the SIP call applies only during summer seasons (when ozone forms), that the stack test underestimates emissions during the winter cannot justify the 15% multiplier. This contention is to no avail. Because the record contains evidence that NO_x rates determined by the stack test can vary widely even during the ozone season, EPA's decision was reasonable. *See* Docket A-97-35, Item IV-A-1 at 43-54 (August 26, 1998).

Conclusion

We vacate EPA's final rule with respect to Wisconsin, Missouri, and Georgia *(see* Part II.A-B). These cases are remanded for further consideration in light of this opinion. We hold that EPA failed to provide adequate notice of a change in the definition of an electric generating unit *(see* Part IV.B.5), and that EPA did not provide adequate notice of a change in the control level assumed for large stationary internal combustion engines (*see* Part IV.C). These cases are also remanded.

In all other respects, the petitions for review are denied.

So ordered.

SENTELLE, *Circuit Judge, dissenting*: Unlike the majority's journey through this regulatory scheme, mine is neither lengthy nor complex, because I get off at the first stop. In promulgating the regulations at issue, EPA purported to exercise the authority Congress conferred upon it to enforce the requirements of 42 U.S.C. § 7410(a)(2)(D)(i)(I) which empowers the Administrator to police the contents of State Implementation Plans ("SIPs"), specifically to ensure that such plans contain

> adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . *contribute significantly* to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . . .

42 U.S.C. § 7410(a)(2)(D)(i)(I) (1994) (emphasis added). EPA is a federal agency—a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. If there is no statute conferring authority, a federal agency has none. The only statute upon which EPA purports to rely in the current controversy is § 7410(a)(2)(D)(i)(I). That section provides authority for EPA to require States to act in a certain fashion based upon the presence of sources or activities which emit "pollutants in *amounts* which will . . . *contribute significantly* to nonattainment." It would appear to me that Congress clearly empowered EPA to base its actions on amounts of pollutants, those amounts to be measured in terms of significance of contribution to downwind nonattainment. Instead, EPA has chosen, doubtless in the pursuit of beneficent ends, to assert authority to require the SIPs to contain provisions based not on the amounts of pollutants, nor even on the relative significance of the contributions of such pollutants to downwind nonattainment, but on the relative cost effective-

ness of alleviation. I agree with the State petitioners that it is undeniable that EPA has exceeded its statutory authority.

We have before had occasion to remind EPA that its mission is not a roving commission to achieve pure air or any other laudable goal. In *American Petroleum Institute v. United States EPA*, 52 F.3d 1113 (D.C. Cir. 1995), we reviewed an EPA rule requiring that thirty percent of the oxygen in reformulated gasoline be derived from renewable sources, such as ethanol. The statutory authority under which EPA operated, 42 U.S.C. § 7545(k)(1) empowered EPA to promulgate regulations achieving "the greatest reduction in emissions of ozone forming volatile organic compounds . . . ." 42 U.S.C. § 7545(k)(1). Although EPA advanced commendable goals of economic benefit for its inclusion of the additional goal of ethanol market protection, we struck down the overreaching and reminded EPA that "it is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *API*, 52 F.3d at 1119 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

Similarly, in *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), we considered EPA's denial of a Clean Air Act waiver application based on health considerations. We did not suggest that EPA acted in bad faith or that health considerations were not important, but we repaired to the statutory grant of authority in 42 U.S.C. § 7545(f)(4), which based the Administrator's authority to deny waiver solely on the property of an additive to "cause or contribute to a failure of any emission control device or system . . . ." 42 U.S.C. § 7545(f)(4). We again granted the petition for review of the Administration's action, reminding EPA that where "the plain language of a provision makes it clear that . . . decisions are to be based on one criterion, the EPA cannot base its decision on other criteria," even on a criterion as laudable as the health of the public. *Ethyl Corp.*, 51 F.3d at 1058.

For all the majority's discussion of inconsistent arguments by States and the possibility of taking costs into account elsewhere raised by the Administration and adopted by the majority, I do not see why the present controversy does not fall squarely within the four corners of *API* and *Ethyl Corp.* Congress set forth one criterion: the emission of an amount of pollutant sufficient to contribute significantly to downwind nonattainment. EPA adopted a different criterion: the cost effectiveness of alleviation. I would remind the agency once more of the lessons of *API* and *Ethyl Corp.*, allow the petitions for review, and end the case.

The majority makes a fundamental mistake by divorcing the adverb "significantly" from the verb it modifies, "contribute." The majority compounds its error by divorcing significantly from the rest of the statutory provision in issue. Maj. Op. at 19-23. By focusing on "significance" or what it means to be "significant," the majority ignores the fact that the statute permits EPA to address that which is "*contribut[ed]* significantly." 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). And what should EPA look for as being contributed significantly? Congress clearly answered that question for the agency as being an "amount" of an "air pollutant." *Id.* Considering that Congress expressly gave EPA authority with regard to "any *air pollutant* in *amounts* which will . . . *contribute* significantly to nonattainment . . . ," *id.* (emphasis added), I marvel at an interpretation that permits cost effectiveness to find a place in a statutory provision addressing amounts of air pollutant contribution. While the contribution must affect nonattainment significantly, no reasonable reading of the statutory provision in its entirety allows the term significantly to springboard costs of alleviation into EPA's statutorily-defined authority. Given § 7410(a)(2)(D)(i)(I)'s mandate as a whole, it becomes clear that EPA and the majority have to contort the statute's language by isolating the term significantly and ignoring the terms air pollutant, amounts, and contribute in order to work cost considerations

into the statute. I just cannot agree with such an unusual exercise in statutory construction.

I see nothing in *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), that either compels or counsels the majority's result. EPA argues that Congress did not define significant contribution. True, it did not. Neither did it define amount. But neither EPA nor the majority have offered any reasonable interpretation of those words which makes them depend upon or even relate to the cost effectiveness of alleviation.[1] EPA comes close to arguing: Congress has not expressly forbidden us to use this criterion, therefore we may use it. As we said in *Ethyl Corp.*:

> To suggest, as the [EPA] effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power . . . , is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent.

---

[1] Contrary to the suggestion of the majority, neither of the cases cited by the majority bear any implication that the cost of alleviating or otherwise dealing with risk expressed as a noun or a verb has any effect upon the definition of "significant" or "significantly" used as an adjective or adverb modifying that noun or verb. The portion of *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 655 (1980) (plurality opinion) quoted by the majority to the effect "that a 'significant' risk . . . is not a mathematical straitjacket," (Maj. Op. at 20) does not deal in any fashion with the cost of alleviation. Rather, Justice Stevens in that opinion was contrasting the significance of a one-in-a-billion chance of cancer from drinking chlorinated water against the one-in-a-thousand risk that regular inhalation of certain benzene-containing vapors would be fatal. Obviously, the "significance" of the risk deals with its importance, not the cost of its alleviation. Equally off point is *International Union, United Auto Workers v. OSHA*, 37 F.3d 665, 668-69 (D.C. Cir. 1994), which concerned the cost-effectiveness of alleviating measures directed at risk theretofore determined to have been significant, not with the use of cost-effectiveness in determining the significance of the risk *vel non*.

51 F.3d at 1060. Because the majority's deference to EPA's unreasonable statutory interpretation as couched in the agency's scurrilous "second-step" cost effectiveness analysis ventures off track, as I said, I am getting off at the first stop.

Because I would invalidate the regulatory scheme before us at its inception, I will not address the subsidiary issues pursued by my colleagues.

[Filed Jun 22, 2000]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1999

No. 98-1497

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY AND STATE OF WEST VIRGINIA, DIVISION OF ENVIRONMENTAL PROTECTION,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NEW ENGLAND COUNCIL, INC., *et al.*,

Intervenors

Consolidated with

98-1499, 98-1500, 98-1501, 98-1502, 98-1504, 98-1518, 98-1556, 98-1567, 98-1573, 98-1585, 98-1588, 98-1590, 98-1596, 98-1598, 98-1601, 98-1602, 98-1608, 98-1609, 98-1611, 98-1615, 98-1616, 98-1617, 98-1618, 98-1619, 98-1621, 99-1070, 99-1093

BEFORE: WILLIAMS, SENTELLE AND ROGERS, *Circuit Judges*.

ORDER

Upon consideration of the petitions for rehearing of the Industry/Labor petitioners and of the petitioning States, filed April 20, 2000, and of the response thereto, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Sentelle would grant the petition of the Industry/Labor parties and Part I of the petition of the petitioning States.

[Filed Jun 22, 2000]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1999

No. 98-1497

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY AND STATE OF WEST VIRGINIA, DIVISION OF ENVIRONMENTAL PROTECTION,

Petitioners

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ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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98-1499, 98-1500, 98-1501, 98-1502, 98-1504, 98-1518, 98-1556, 98-1567, 98-1573, 98-1585, 98-1588, 98-1590, 98-1596, 98-1598, 98-1601, 98-1602, 98-1608, 98-1609, 98-1611, 98-1615, 98-1616, 98-1617, 98-1618, 98-1619, 98-1621, 99-1070, 99-1093

BEFORE: EDWARDS, Chief Judge; SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*

ORDER

The petitions for rehearing en banc of the Industry/Labor petitioners, the petitioning States, and the response thereto have been circulated to the full court. The taking of a vote

was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Sentelle would grant the petition of the Industry/Labor petitioners and Part I of the petition of the petitioning States.

Circuit Judges Tatel and Garland did not participate in this matter.

[Mandate Issued: 9/13/00]
/s/ E Brown Deputy Clerk
[Filed Mar. 3, 2000]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1497

STATE OF MICHIGAN,
MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY AND
STATE OF WEST VIRGINIA, DIVISION OF
ENVIRONMENTAL PROTECTION,
Petitioners

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent

NEW ENGLAND COUNCIL, INC., *et al.*,
Intervenors

Consolidated with

98-1499, 98-1500, 98-1501, 98-1502, 98-1504, 98-1518,
98-1556, 98-1567, 98-1573, 98-1585, 98-1588, 98-1590,
98-1596, 98-1598, 98-1601, 98-1602, 98-1608, 98-1609,
98-1611, 98-1615, 98-1616, 98-1617, 98-1618, 98-1619,
98-1621, 99-1070, 99-1093

On Petitions for Review of an Order of the
Environmental Protection Agency

Before: WILLIAMS, SENTELLE and ROGERS, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Environmental Protection Agency and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review in Nos. 98-1567 and 99-1093 are granted, the petitions in Nos. 98-1609 and 98-1618 are granted in part and denied in part, and the remaining petitions are denied, all in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
MARK J. LANGER,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy/Clerk

Date: March 3, 2000

Opinion *Per Curiam*
Dissenting opinion filed by Circuit Judge Sentelle.

(2) (4) (3)

Nos. 00-445, 00-632 and 00-633

Supreme Court, U.S.
FILED
JAN 4 2001
CLERK

IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

-and-

STATE OF MICHIGAN, *et al.*,
Petitioners,

-and-

STATES OF OHIO AND INDIANA,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS NEW YORK, CONNECTICUT, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, PENNSYLVANIA, RHODE ISLAND AND VERMONT IN OPPOSITION TO PETITIONS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Environmental Protection Agency (EPA), in allocating equitably the burden of emission reductions among "upwind" States found to contribute significantly to "downwind" States' nonattainment of the National Ambient Air Quality Standard (NAAQS) for ozone pursuant to section 110(a)(2)(D) of the Clean Air Act, is allowed to consider the relative cost to each upwind State of emission reductions after first determining which States are significant contributors based solely on air quality factors.

2. Whether the court below correctly held that EPA's exercise of its administrative authority to identify the upwind States with emission levels that contributed significantly to nonattainment of NAAQS in downwind States and determine the amount of emission reductions required of upwind States did not violate the non-delegation doctrine.

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The States of New York, Connecticut, Maine, Maryland, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, and Vermont (collectively, the "respondent States") oppose the petitions for certiorari filed by petitioners Appalachian Power Company, *et al.* (hereinafter "Industry petitioners"), State of Michigan, *et al.* (hereinafter "Michigan") and State of Ohio, *et al.* (hereinafter "Ohio"). The petitions seek review of the March 3, 2000 judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the bulk of EPA's NO_x SIP Call rule (the "Rule"). *See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Rule*, 63 Fed. Reg. 57356, *et seq.* (1998). For the reasons set forth below, the petitions should be denied, thereby allowing timely implementation of the Rule and enabling the downwind States to meet their statutory obligation to ensure that their residents breathe clean air.

COUNTERSTATEMENT OF THE CASE

In 1998, EPA promulgated the NO_x SIP Call, which requires that twenty-two States and the District of Columbia revise their State Implementation Plans (SIPs) to reduce emissions of nitrogen oxides (NO_x). The Rule was based on overwhelming evidence, undisputed in this case, that emissions of NO_x pollution from numerous sources in many States in the eastern half of the United States contribute to harmful levels of ozone, a pollutant that causes respiratory distress, in many portions of the eastern United States. *See* 63 Fed. Reg. at 57377. Recognizing that many States would have difficulty in achieving the National Ambient Air Quality Standard (NAAQS) for ozone without reductions in the incoming pollution levels, EPA exercised its authority

under section 110 of the Clean Air Act (the "Act") to require emission reductions in all States that contribute to the problem of transported ozone pollution. Implementation of the NO_x SIP Call will ensure that residents of much of the eastern half of the nation, including but not limited to residents of the respondent States, will obtain the benefits of clean air within the timetable set by Congress in the 1990 amendments to the Act.

A. Statutory and Regulatory Background: Establishing and Maintaining the NAAQS

Under sections 108 and 109 of the Act, EPA is responsible for identifying the pollutants that are harmful to public health when present in the ambient air and for establishing the ambient levels of such pollutants that the States are required to achieve. The Act requires EPA to set NAAQS for these "criteria pollutants" at levels that are "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). Under long-standing EPA practice and the holdings of the D.C. Circuit, EPA is to set the NAAQS without regard to the economic ramifications of the levels chosen. *See American Trucking Assns. v. EPA*, 175 F.3d 1027, 1038, *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003, 120 S. Ct. 2193 (2000) (*ATA*); *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).[1] EPA set the NAAQS for ozone at issue in this case in 1979. *See* 44 Fed. Reg. 8202 (1979).

Section 110 of the Act requires each State to submit to EPA a SIP that provides for the attainment of the NAAQS

1. The continuing validity of this principle is being reviewed by the Court in *ATA*.

within the State. The SIP must demonstrate how State regulations will result in the emission reductions necessary to achieve the NAAQS. This Court has held that technical or economic infeasibility does not excuse a State from its obligation to achieve acceptable air quality for its citizens. *See Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

Congress recognized, however, that a State may be prevented from attaining the NAAQS, or at least hampered in its efforts to do so, by pollution transported from other States. Accordingly, just as section 110(a)(2)(A) requires each State to submit a plan to attain the NAAQS, section 110(a)(2)(D) requires each State's plan to ensure that emissions activities within its borders do not "contribute significantly" to nonattainment downwind. This obligation is "intended to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." S. Rep. No. 95-127, reprinted in *A Legislative History of the Clean Air Act Amendments of 1977* (1978) at 1416 (the "1977 Senate Report").

B. Transported Ozone Pollution and the NO_x SIP Call

In promulgating the Clean Air Act Amendments of 1990, Congress recognized that regional control strategies were still needed to address the migration of ozone and its precursors:

> The bill reflects an increasing understanding of how ozone pollution is formed and transported. Because ozone is not a local phenomenon but is formed and transported over hundreds of miles and several days, localized control strategies will not be effective in reducing ozone levels.

S. Rep. No. 101-228 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3389, 3399. To develop a regional control strategy for attaining the NAAQS across the eastern half of the United States, all States east of the Rocky Mountains (including the District of Columbia) participated in the working group known as the Ozone Transport Assessment Group (OTAG), which tried to craft a solution to the problem of transported ozone. Although the participating States endorsed OTAG's extensive and sophisticated technical analyses and recognized that region-wide NO_x reductions were needed, the divergent interests of the OTAG States prevented them from agreeing on the details of a control strategy, including the level of NO_x reductions required. In general, the northeastern States, which are downwind of the bulk of the NO_x emission sources, advocated more stringent controls than Ohio, Michigan and the other States joining in the petitions for certiorari, which are host to many of the large NO_x emission sources.

In the absence of a State consensus on all the elements of a NO_x control program, EPA used OTAG's data and analyses to develop the NO_x SIP Call, the rule at issue here. In doing so, EPA evaluated the contribution of NO_x emissions in thirty-seven States east of the Rocky Mountains to ozone noncompliance in a number of eastern, southern and midwestern locations, including the New York City metropolitan area and other urban areas along the eastern seaboard, the Atlanta, Birmingham, Chicago, Cincinnati, Louisville, Pittsburgh and St. Louis metropolitan areas, and southwestern Michigan. *See* 63 Fed. Reg. at 57387. Given the number of source and receptor regions, EPA had to consider hundreds of source/receptor combinations. Using advanced air quality modeling techniques, EPA identified twenty-two States and the District of Columbia as "significant

contributors" to ozone nonattainment in other States, based on its evaluation of the magnitude, frequency and relative amount of each State's contribution to ozone non-attainment in downwind States. *See* 213 F.3d at 675. EPA determined that each of these States was making a significant contribution to ozone nonattainment in at least two other States and, in many cases, in numerous downwind States in different directions and at different distances from the upwind State. *See* 63 Fed. Reg. at 57394, Table II-4.[2] For example, EPA found that Indiana contributes significantly to ozone nonattainment in a number of eastern seaboard areas such as New York City and Baltimore, as well as to the nonattainment problems in Southwestern Michigan (to the north), Cincinnati (to the southeast), Louisville (to the south), and Chicago (to the northwest). Indiana's contribution ranged from an average of 17% to Louisville's ozone levels, 11% to Cincinnati's, 10% to southwestern Michigan's and 9% to Chicago's, to average contributions in the range of 1-2% to ozone levels in eastern seaboard locations.[3]

Once it identified the twenty-three jurisdictions that were significant contributors to at least two downwind ozone nonattainment areas, EPA determined the amount by which each State's NO_x emissions should be reduced to mitigate its significant contribution to numerous downwind States.

2. With the exception of Tennessee, West Virginia and the Carolinas, each of the States identified as significant contributors contains at least a portion of a nonattainment area within its borders.

3. Detailed listing of the contributions to downwind nonattainment of each of the twenty-three jurisdictions subject to the Rule are contained in the *Air Quality Modeling Technical Support Document for the Regional NO_x SIP Call* (September 21, 1998) (which is part of the record before the court below) and summarized at 63 Fed. Reg. at 57387-99.

In so doing, EPA recognized that each upwind State contributes in varying degrees to ozone nonattainment in several downwind States and that each nonattainment area's ozone originated in a number of upwind States. Thus, rather than requiring an upwind State to reduce its emissions by different amounts for each downwind area affected by its emissions, EPA determined that a single level of emission reduction would mitigate the impact of that State's emissions on all downwind States. EPA decided to require only the level of emission reductions that could be obtained in a highly cost-effective manner — that is, at a cost of $2000 per ton or less. *See* 213 F.3d at 675. Rather than requiring each State that contributed significantly to downwind nonattainment to eliminate all its NO_x emissions, EPA concluded that it is fair and consistent with the Act to require upwind States "to reduce *at least* the portion of their emissions for which highly cost-effective controls are available." 63 Fed. Reg. at 57379.

EPA based the $2000/ton figure on "$NO_x$ emissions controls that are available and of comparable cost to other recently undertaken or planned NO_x measures," including "the types of controls EPA and States have needed to adopt most recently because their previous planning efforts have already taken advantage of opportunities for even cheaper controls." *Id.* at 57400. In other words, the $2000/ton figure was based on the costs of controls already being incurred in the downwind States that are burdened by ozone transport. EPA explained that its selection of the $2000/ton criterion was a "first approximation" at determining the level of controls that should be required of upwind sources to eliminate significant contributions to downwind nonattainment and that further reductions may be required in the future if needed to achieve regional ozone nonattainment. *See id.* at 57399.

On the basis of additional modeling, EPA determined that the emissions reductions achieved through application of highly cost-effective measures throughout the region would allow nonattainment areas to make "appreciable progress towards attainment," but would not require more reductions in upwind States than necessary to achieve attainment in all downwind areas affected by those States' emissions. *Id.* at 57379, 57386 n.38, 57389-391. Thus, without requiring any States to implement unduly costly control requirements, the Rule enables all States in the eastern half of the United States to obtain the benefits of clean air for their residents.

C. The Decision of the Court of Appeals

The Rule was challenged by numerous utilities and businesses and by several midwestern and southern states. On March 3, 2000, the Court of Appeals issued its decision upholding the bulk of the NO_x SIP Call. *See Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000). The court first upheld EPA's use of complicated air quality modeling in identifying States as significant contributors. *See id.* at 673-74. It then determined that EPA did not err in using costs in determining the amount of emission reductions required from each State that had been found to contribute significantly to downwind nonattainment. In so doing, the court relied upon its own longstanding precedent that an agency may consider costs unless there is a "clear congressional intent to preclude consideration of cost." *Id.* at 678 (quoting *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987)). The court concluded that the phrase "contribute significantly" in section 110(a)(2)(D) does not express a clear congressional intent to exclude consideration of cost. *See id.* at 679. Without actually determining that the phrase

"contribute significantly" *requires* consideration of costs or equitable factors, the court noted that it would be difficult to draw a line between the level of emissions that are permissible and those that are not without considering costs and other equitable factors. *See id.* at 678. The court below also rejected several other arguments, including a nondelegation challenge. *See id.* at 680-81.[4]

Petitions for rehearing and rehearing *en banc* were denied on June 22, 2000.

REASONS FOR DENYING THE WRIT

None of the petitioners disputes the public health dangers associated with high levels of ozone pollution. Nor do petitioners contest EPA's conclusion that the ozone attainment problems throughout the eastern half of the nation result from emission activity at hundreds of large and small sources of NO_x emissions across the region or its finding that each source State individually contributes to NAAQS non-attainment in numerous downwind States in widely differing amounts. Furthermore, the petitioners agree that EPA has authority under section 110 to require upwind States to revise their SIPs to mitigate their contribution to downwind ozone nonattainment.

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4. The D.C. Circuit did vacate certain aspects of the Rule. It determined that Wisconsin should not have been included in the Rule and that the emission reductions required of Georgia and Missouri should be based solely on the emissions from the portions of those States found to contribute to downwind nonattainment. *See* 213 F.3d at 681-85. It also determined that EPA did not provide sufficient notice of the definition of an electric generating unit and of the control level assumed for large stationary internal combustion engines. *See id.* at 691-94.

Instead, the petitioners' only complaint is with the level of emission reductions required in Ohio, Michigan and the other petitioning States. They claim that EPA misconstrued the term "contribute significantly" in section 110(a)(2)(D) of the Clean Air Act by including costs of controls among the factors considered in determining the amount of emission reduction required of each State that contributes to regional ozone pollution. Although Ohio tries to inflate the importance of the issue by suggesting that EPA's analysis is not "federalism-sensitive," this issue involves routine administrative application of a statutory standard that does not merit review by this Court. In fact, although the various petitioners do not agree on the reasons why EPA's consideration of costs violated the Act, some of them recognize that costs can play a role in the analysis and argue that EPA erred not in considering costs at all, but in the way it considered costs. *Industry Pet.* at 12; *Ohio Pet.* at 10-11.[5]

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5. Michigan adheres to the position that costs should play no role in the analysis, despite acknowledging that the case on which it chiefly relies, *Union Electric*, *supra*, recognizes a role for consideration of costs under section 110. *Michigan Pet.* at 9 n.4.

I.

THE CLEAN AIR ACT AND DECISIONS OF THIS COURT PERMIT EPA'S CONSIDERATION OF COST-EFFECTIVENESS IN IDENTIFYING THE EMISSION REDUCTIONS REQUIRED OF EACH STATE.

A. The Court of Appeals' Decision is Not Inconsistent with Decisions of this Court and the D.C. Circuit Prohibiting the Consideration of Costs in Other Contexts.

Section 110(a)(2)(D) does not specify how EPA should determine what emissions make a significant contribution to downwind States. It does not say that cost-effectiveness of controls or other economic factors are relevant considerations. Nor does section 110(a)(2)(D) preclude the consideration of cost-effectiveness of controls in determining the amount of excess emissions in each State. Accordingly, the Court of Appeals acted properly in concluding that EPA may consider the costs of controlling emissions in determining whether the risk posed by the emissions is significant. *See* 213 F.3d at 677-78 (citing *International Union, UAW v. OSHA*, 37 F.3d 665, 668-69 (D.C. Cir. 1994), and Breyer, *et al.*, *Administrative Law and Regulatory Policy* 65 (4th ed. 1999)).

Both the State petitioners and the Industry petitioners misconstrue the role of costs in EPA's analysis. They attempt unsuccessfully to demonstrate an inconsistency between the D.C. Circuit's decision in this case, which upholds EPA's consideration of costs for the limited purpose of allocating the burdens of emission reductions, and decisions of this Court and the D.C. Circuit addressing EPA's use of cost considerations in unrelated contexts.

1. Industry petitioners' attempt to create the appearance of an inconsistency with other D.C. Circuit cases does not provide a basis for certiorari.

The Industry petitioners' argument that the Court of Appeals' decision is inconsistent with prior D.C. Circuit cases does not support the grant of certiorari in this case. As an initial matter, an alleged conflict between decisions of the D.C. Circuit does not provide a basis for certiorari. Conflicts between decisions of a single court of appeals should be addressed through petitions for rehearing *en banc*, rather than through certiorari. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974) (referencing earlier petition for certiorari that had been denied when conflict was between decisions of the same Circuit); *see also* Stern, *et al., Supreme Court Practice* 176 (7th ed. 1993). Petitioners' suggestion that an inter-circuit conflict over a Clean Air Act issue cannot possibly arise because the D.C. Circuit has sole jurisdiction over appeals of actions and administrative proceedings under the Act (*Michigan Pet.* at 19) is not only irrelevant but simply wrong. EPA's administrative determinations regarding the compliance of SIPs with the requirements of section 110(a)(2)(D) are generally reviewed in the circuit for the state whose SIP is being challenged. *See* 42 U.S.C. § 7607(b). In fact, the challenge to the Missouri SIP in *Union Electric*, upon which Michigan relies, was heard by the Eighth Circuit, not the D.C. Circuit. *See* 427 U.S. at 252-53.

Furthermore, the decisions on which Industry petitioners rely are inapposite to the present case. In *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995), the D.C. Circuit held that a regulation that allowed EPA to prohibit a fuel additive only if it "cause[d] or contribute[d] to failure of any emission

control device" did not provide EPA with the authority to bar the additive on the entirely unrelated ground that it may cause adverse health effects. Likewise, in *American Petroleum Institute v. United States EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("*API*"), EPA improperly promulgated fuel content regulations that were directed at promoting the use of renewable fuel sources, rather than at reducing emissions of volatile organic compounds and toxic air pollutants, as required by Congress. These decisions interpreted statutes clearly barring the use of factors that had been erroneously applied by EPA, whereas in this case section 110(a)(2)(D) does not bar the consideration of costs. In fact, EPA's consideration of the relative costs of controlling emissions is consistent with Congressional intent that the burden of controlling interstate pollution be shared by all States that contribute to the problem. *See 1977 Senate Report* at 1416.

Nor did EPA's rule subordinate air quality factors to considerations of cost-effectiveness. Industry petitioners overstate the role of costs in EPA's determination when they contend that EPA "considered as its sole factor the cost-effectiveness of emission reductions in determining whether one state's contribution to another state's ozone nonattainment air quality is 'significant.' " *Industry Pet.* at 13. In fact, as the State petitioners recognize, EPA's determination of whether a State contributed significantly to downwind nonattainment was based solely on air quality factors, with costs playing a role only in determining the amount of emissions to be reduced. *Michigan Pet.* at 5-6; *Ohio Pet.* at 4-5.[6]

6. If Industry petitioners were right that cost of compliance was the sole factor considered by EPA, the Rule would have encompassed all thirty-seven States included in OTAG, rather than just the twenty-

(Cont'd)

Ultimately, Industry petitioners concede that EPA may consider the relative costs of controls in determining the NO_x reductions required of each State, albeit under section 110(k)(5) of the Act rather than section 110(a)(2)(D). *Industry Pet.* at 18. This distinction, however, has no basis in the language of the statute, because, like section 110(a)(2)(D), section 110(k)(5) contains no specific reference to the consideration of costs. If such consideration of costs is valid, it is equally valid under both provisions.

2. Michigan's argument that the Court of Appeals' decision is contrary to this Court's holdings in *Union Electric Co.* and the holding of the D.C. Circuit in *Lead Industries Association* should be rejected because it misconstrues those cases and was not properly preserved for this Court's consideration.

Michigan's primary argument, that prior decisions under sections 109 and 110 of the Act prohibit EPA from considering costs in setting the NAAQS and in reviewing SIPs for compliance with those NAAQS, was not presented to the court below. The cases upon which Michigan now relies — *Lead Industries Association* and *Union Electric* — are cited nowhere in the Brief or Reply Brief filed below by Michigan and other upwind States. The explanation for that omission is simple: the premise of both *Union Electric* and *Lead Industries Association* — that costs and economic

(Cont'd)
two States and the District of Columbia that were ultimately included in the Rule. In fact, those twenty-three jurisdictions were included because the impact of their emissions on downwind States exceeded a certain air quality threshold, not because they contained sources that could be controlled at a cost of less than $2000 per ton.

factors cannot be used to weaken the public health protection provided by the NAAQS — is inconsistent with Michigan's position before the Court of Appeals, where it argued that the emission reductions required by the NO_x SIP Call were more extensive than needed. *See, e.g. Reply Brief of Petitioning States* at 11-12. Now, in an effort to take advantage of the *Union Electric* and *Lead Industries Association* holdings, Michigan shifts gears, suggesting — without any basis in the record and contrary to the results of EPA's modeling — that EPA's consideration of costs somehow weakened the public health protections of the Act.[7]

As an initial matter, this Court should reject Michigan's argument as a basis for *certiorari* because the argument was neither presented to EPA during the public comment process, as required by CAA section 307(d)(7)(B),[8] nor made to the court below. *See, e.g. Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (refusing to consider propriety of award of costs because that issue was not raised in the court of appeals). In fact, Michigan and its co-petitioners were participants in OTAG, which recommended that cost-effectiveness of controls be included as one of the criteria for selection of a strategy to reduce transported ozone. *See* 63 Fed. Reg. at 57363.

In any event, there is no conflict between the decision below and decisions considering the use of costs to reduce

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7. Notably, Ohio (the lead upwind State in the D.C. Circuit proceedings) and Indiana do not join Michigan in this new argument.

8. Section 307(d)(7)(B) provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review."

protections against unhealthy air under other provisions of the Clean Air Act. EPA's consideration of costs did not reduce the level of public health protection at all; in fact, the Rule's emission reduction requirements are the most stringent of the range of possible reductions identified by OTAG. Instead of using cost considerations to reduce public health protection, EPA used relative costs of NO_x reductions to allocate equitably the emission reductions needed to achieve the preexisting public health goal of attainment of the NAAQS. Thus, in the present case, unlike the decisions on which Michigan relies, the consideration of costs is consistent with, rather than contrary to, Congress' intent to protect the public from the adverse health effects of poor air quality.

In *Lead Industries Association,* the D.C. Circuit held that EPA could not, in setting the health-based primary NAAQS, consider the economic feasibility of attaining the NAAQS. The court held that the language of section 109 evidenced a clear Congressional intent that the NAAQS should be set solely on the basis of the need to protect public health. The court emphasized that the NAAQS are intended to be "technology-forcing," meaning that Congress understood and intended that industry would have to develop new technologies, at potentially great cost, to achieve the NAAQS. *See* 647 F.2d at 1149. Similarly, in *Union Electric*, this Court found that EPA need not consider the feasibility of compliance with a SIP in evaluating the sufficiency of a SIP under section 110 of the Act. In that case, Union Electric, an electric utility located in Missouri, challenged EPA's approval of the Missouri SIP on the ground that compliance with the emission limitations contained in the SIP was not technologically and economically feasible. The Court held that EPA may not allow claims of economic and technological

feasibility to excuse a State from submitting a SIP that promotes attainment of the health-based NAAQS. *See* 427 U.S. at 265. Notably, however, the Court recognized that economic factors may be considered as long as "consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards." 427 U.S. at 266.

In the present case, by contrast, EPA's consideration of costs does not interfere with the prompt attainment of the national air quality standards. Congress' goal, as in *Lead Industries Association* and *Union Electric*, is attainment of NAAQS by specific dates. EPA set the requisite ozone NAAQS without regard to economic factors, and EPA's consideration of costs does not reduce the protection provided by the NAAQS to downwind States and their residents. To the contrary, EPA's modeling confirmed that the emission reductions required by the Rule, after consideration of costs, will enable downwind States, including some of the State respondents, to make significant progress towards attainment of the NAAQS.[9] *See* 63 Fed. Reg. at 57379. The costs of reducing NO_x emissions to achieve these NAAQS were considered only in allocating the burden of reducing NO_x emissions among the various States that contribute to ozone

9. EPA recognized that the downwind States may have to bear an additional burden in attaining the NAAQS because the emission reductions required by the NO_x SIP Call are sufficient to put the NAAQS within reach of all States, but may be insufficient to bring about attainment of the NAAQS in all locations without any further reductions from the downwind States. Of course, EPA could have provided for attainment by raising the cost cut-off from $2000 to a higher level, perhaps $2500. It is the downwind States that support the Rule that may have to implement the higher level of controls themselves, not upwind States like Michigan.

nonattainment in the eastern United States, thereby effectuating Congress' intent to apportion equitably the burden of emission reduction efforts. Far from "interfer[ing] with the primary congressional purpose of prompt attainment of the national air quality standards," the NO_x SIP Call rule makes such attainment possible throughout the eastern portion of the United States without requiring any unneeded emission reductions.[10] In the absence of this Rule, regions that are home to millions of Americans will not achieve the NAAQS within the timetable set by Congress. *Id.* at 57363.

B. The Upwind States' Argument that the NO_x SIP Call Rule Violates Principles of "Federalism" and "State Sovereignty" is Meritless and does not Provide a Basis for Certiorari.

The State petitioners contend that EPA misallocated the burden of emission reductions among the States. Michigan and Ohio (and their co-petitioners) evidently believe that EPA's method of apportioning the burden of compliance in accordance with the costs of controlling the emissions results in sources in those States bearing a greater share of emission reductions than they would like. In an attempt to disguise their challenge to EPA's method as a subject that might merit

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10. EPA's use of costs in this case is similar to the waiver process approved by this Court in *Union Electric*. The Court determined that States are free to exempt facilities or industry groups from control requirements under the SIP on grounds of economic infeasibility so long as doing so does not interfere with attainment of the NAAQS. *See* 427 U.S. at 266-67. Likewise, here EPA is free to exclude sources that cannot be controlled in a highly cost-effective manner from its calculation of State budgets, as long as doing so does not interfere with attainment of the NAAQS.

this Court's review, Ohio contends, without supporting its position and without citation to case law, that EPA's application of section 110 is somehow inconsistent with unspecified principles of "federalism" or "state sovereignty."

Underlying this argument is the State petitioners' failure to recognize that each upwind State contributes to varying degrees to numerous downwind States. For example, State petitioners note that Indiana and Pennsylvania are being required to reduce their emissions by approximately the same amount, even though Pennsylvania's impact on the downwind New York City nonattainment area is greater. *Ohio Pet.* at 12-13; *Michigan Pet.* at 22-23. The State petitioners ignore, however, that Indiana emissions have a much greater effect than Pennsylvania emissions on other nonattainment areas that are closer to Indiana, such as Louisville (to which Indiana contributes an average of 17% of the ozone and Pennsylvania less than 1%), Cincinnati (Indiana 11%; Pennsylvania 1%), Southwestern Michigan (Indiana 10%; Pennsylvania less than 1%) and Chicago (Indiana 9%; Pennsylvania less than 1%). Thus, shifting the focus from New York City to Cincinnati, Chicago or Louisville as a receptor area would mean that it is Pennsylvania, rather than Indiana, that is being required to obtain excess emission reductions under the Rule. Considering that each upwind State contributes varying amounts of ozone to numerous downwind States, EPA's approach recognizes the impossibility of requiring that a State reduce its emissions by different amounts for each downwind State to which it contributes.

Ultimately, EPA's allocation methodology follows from its recognition that nonattainment throughout the eastern half of the United States is the result of the collective contribution

of countless sources throughout the area, a finding that is being challenged by none of the Petitioners. In light of the regional nature of the ozone nonattainment problem, the Rule effectuates Congressional intent to allocate the burden of compliance among the States containing sources that contribute to the problem. Notwithstanding State petitioners' attempt to disguise their challenge as a defense of federalism, their argument that EPA could or should have allocated the emission reductions differently does not implicate principles of State sovereignty.

II.

THE COURT BELOW CORRECTLY REJECTED PETITIONERS' NONDELEGATION ARGUMENTS.

The Industry petitioners' effort to obtain review of the D.C. Circuit's nondelegation holding fails for several reasons. First, and most fundamentally, the delegation at issue in this case is narrower than the broad delegations that have been upheld by this Court. *See, e.g. Touby v. United States*, 500 U.S. 160 (1991); *United States v. Mistretta*, 488 U.S. 361, 371-72 (1988); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FPA v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *Yakus v United States*, 321 U.S. 414 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943).

Second, the Court of Appeals correctly concluded in this case that the nondelegation doctrine does not require as precise a delegation when the agency action is of more limited scope than a broad legislative rule of nationwide application. In this case, in exercising its authority under section 110(a)(2)(D), EPA did not issue a quasi-legislative rule, but

rather made quintessentially administrative, fact-specific determinations regarding dozens of state-to-state comparisons:

> [A]s a practical matter EPA must make a number of threshold determinations that in practice appear to have confined the statute to a modest role. Before assessing "significance," EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment.

213 F.3d at 680. *See also* H.R. 95-294, 330 95th Cong. 1st Sess., reprinted in 4 *A Legislative History of the Clean Air Act Amendments of 1977*, 2797 (1978) (describing the interstate transport provisions of the Act as "a Federal mechanism for resolving disputes which cannot be decided through cooperation and consultation between the States or persons involved"). Congress' delegation of authority to make this type of fact-specific, case-by-case determination does not implicate the non-delegation doctrine, which bars only the delegation of *legislative* power. *See Touby*, 500 U.S. at 165 (the nondelegation doctrine means "that Congress may not constitutionally delegate its legislative power to another branch of government.").

Recognizing the limitations of the legislative process, this Court's precedent establishes that administrative agencies must have ample leeway to apply Congress' policy choices on a case-by-case basis, as EPA did in this case. In *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), this Court recognized that Congress cannot oversee the application of its policy choices to all the specific factual circumstances that may arise:

> The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

329 U.S. at 105. *See also SEC v. Chenery*, 332 U.S. 194, 202-03 (1947) ("the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399-400 (1940) (referring to the need for the agency to use its expertise in applying the policy expressed in a statute to particular factual circumstances).

Indeed, the D.C. Circuit understood in *ATA* that EPA's exercise of its authority to review efforts to implement NAAQS, as in this case, did not implicate the same non-delegation concerns as the establishment of the NAAQS. In *ATA*, the Court of Appeals distinguished the decision of the First Circuit in *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974), which, like the court below, upheld EPA's authority to determine the steps necessary to achieve a NAAQS against a nondelegation challenge:

> [T]he action challenged in *South Terminal* was EPA's adoption of a plan for ending or preventing

> violations in Boston of already-established NAAQS, not its promulgation of the NAAQS themselves. Thus, it seems likely that the "means" were the plan's provisions . . . and the "fairly precise[ly] defin[ed]" goals were the NAAQS themselves.

ATA, 175 F.3d at 1057. As in *South Terminal Corp.*, the action challenged here is EPA's adoption of a plan intended to end violations of the NAAQS. Thus, both courts of appeals to consider the issue have concluded that section 110 does not present a nondelegation problem.[11]

Finally, notwithstanding petitioners' claim that EPA's action is "unfettered by any obligation to obey Congress' proscription against arbitrary and capricious action" (*Industry Pet.* at 20), a reviewing Court is free to evaluate EPA's significant contribution determinations under an arbitrary and capricious standard, after giving due deference to its interpretation of the statute and its technical determinations. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) (deferring to agency's interpretation of statute that it was charged with administering). The D.C. Circuit did just that when it rejected EPA's inclusion of Wisconsin and the "coarse grid" portions of Georgia and Missouri in the rulemaking. Accordingly, there is no basis to the petitioners' non-delegation challenges.

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11. Furthermore, the decision in *ATA* upon which petitioners rely was incorrect for the reasons set forth in the briefs filed by the EPA, the northeastern States and other petitioners in *Browner v. American Trucking Ass'ns*, U.S. Supreme Court Nos. 99-1257, 99-1263 and 99-1265 (argued on November 7, 2000). Respondent Massachusetts seeks reversal of the D.C. Circuit's decision in *ATA* as a party in those cases and respondents New York, Connecticut, Maine, Maryland, New Hampshire, Rhode Island, and Vermont have all joined in an amicus curiae brief in those cases, supporting reversal of *ATA*.

CONCLUSION

For all the foregoing reasons, the Court should deny the petitions for certiorari.

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Nos. 00-445, 00-632 and 00-633

In The

Supreme Court of the United States

STATE OF MICHIGAN, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether EPA may, under Sections 110(a)(2)(D) and 110(k)(5) of the Clean Air Act, consider cost as one of several factors in determining the amount of emissions reductions that a state must make to adequately mitigate emissions that are significantly contributing to another state's failure to attain a national ambient air quality standard.

2. Whether EPA's action in considering cost as a factor under Sections 110(a)(2)(D) and 110(k)(5) represents a constitutionally permissible exercise of the authority delegated to EPA by Congress.

PARTIES TO THE PROCEEDINGS

1. The following Parties were petitioners in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

In No. 98-1497, State of Michigan, Michigan Department of Environmental Quality and State of West Virginia, Division of Environmental Protection.
In No. 98-1588, State of Ohio.
In No. 98-1596, Commonwealth of Virginia.
In No. 98-1615, State of Alabama, *ex. rel.* Bill Pryor, Attorney General.
In No. 98-1617, State of Indiana and Indiana Department of Environmental Management.
In No. 98-1619, State of North Carolina.
In No. 98-1621, State of South Carolina.
In No. 98-1499, United Mine Workers of America.
In No. 98-1500, Appalachian Power Company, *et al.*, consisting of:
Appalachian Power Company;
Baltimore Gas and Electric Company (now referred to as Constellation Power Source Generation, Inc.);
Carolina Power & Light Company;
Central and South West Services, Inc.:
Central Power and Light Company;
Public Service Company of Oklahoma;
Southwestern Electric Power Company;
West Texas Utilities Company;
Central Illinois Light Company;
Central Illinois Public Service Company;
CINergy;
Columbus Southern Power Company;

PARTIES TO THE PROCEEDINGS – Continued

Commonwealth Edison Company;
Consumers Energy Company;
Dayton Power and Light Company, The;
Detroit Edison Company, The;
Duke Energy Company;
Florida Power Corporation;
Illinois Power Company;
Indiana Michigan Power Company;
Jacksonville Electric Authority;
Kentucky Power Company;
Kentucky Utilities Company;
Louisville Gas and Electric Company;
Madison Gas and Electric Company;
Minnesota Power Company;
Monongahela Power Company, d/b/a Allegheny Power System, Inc.
Northern Indiana Public Service Company;
Oglethorpe Power Corporation;
Ohio Power Company;
Ohio Valley Electric Corporation;
Oklahoma Gas & Electric Company;
Otter Tail Power Company;
PacifiCorp Electric Operations;
Plains Electric Generation & Transmission Cooperative, Inc.;
Potomac Edison Company, The, d/b/a Allegheny Power System, Inc.;
Potomac Electric Power Company;
Public Service Company of New Mexico;
Salt River Project;
South Carolina Electric & Gas Company;
Southern Company:
Alabama Power Company;
Georgia Power Company;
Gulf Power Company;

PARTIES TO THE PROCEEDINGS – Continued

Mississippi Power Company;
Savannah Electric and Power Company;
Tampa Electric Power Company;
Tucson Electric Company;
Union Electric Company;
Virginia Power;
West Penn Power Company, d/b/a Allegheny Power System, Inc.;
Edison Electric Institute;
National Rural Electric Cooperative Association; and
American Public Power Association.

In No. 98-1500, Duquesne Light Company.

In No. 98-1501, Midwest Ozone Group.

In No. 98-1502, West Virginia Chamber of Commerce.

In No. 98-1504, National Mining Association.

In No. 98-1518, West Virginia Manufacturers Association.

In No. 98-1556, City of Springfield, Missouri through the Board of Public Utilities, d/b/a City Utilities of Springfield, Missouri.

In No. 98-1567, Kansas City Power & Light Company;
St. Joseph Light & Power Company;
The Empire District Electric Company;
Utilicorp United, Inc.;
City of Independence, Missouri; and
Associated Electric Cooperative, Inc.

In No. 98-1573, Indianapolis Power & Light Company.

In No. 98-1585, The Alabama Forestry Association, Inc., by and through its section The Alabama Pulp and Paper Counsel.

In No. 98-1590, Dairyland Power Cooperative.

PARTIES TO THE PROCEEDINGS – Continued

In No. 98-1598, South Carolina Public Service Authority, d/b/a Santee Cooper.
In No. 98-1601, American Municipal Power-Ohio.
In No. 98-1602, Fort James Operating Company;
Gilman Paper Company;
Rayonier, Inc.;
Savannah Electric & Power Company;
Southeast Paper Manufacturing Company; and
International Paper Company.
In No. 98-1608, PP&L, Inc.
In No. 98-1609, Council of Industrial Boiler Owners.
In No. 98-1611, Network for Workable Air Policies.
In No. 98-1616, Georgia Coalition for Sound Environmental Policy, Inc.
In No. 98-1618, Interstate Natural Gas Association of America.
In No. 99-1070, Appalachian Power Company, *et al.*
In No. 99-1093, Wisconsin Paper Council;
Madison Gas and Electric Company;
Northern States Power Company;
Wisconsin Public Service Corporation; and
Wisconsin Manufacturers & Commerce.

2. The following Party was a Respondent in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

   U.S. Environmental Protection Agency.

3. The following Parties were Intervenors in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

   Natural Resources Defense Council;
   Environmental Law & Policy Center of the Midwest;

PARTIES TO THE PROCEEDINGS – Continued

American Lung Association of Metropolitan Chicago;
Appalachian Mountain Club;
Citizens Action Coalition of Indiana, Inc.;
Clean Air Council;
Environmental Defense Fund (now referred to as Environmental Defense);
Group Against Smog and Pollution;
Hoosier Environmental Council;
Illinois Environmental Council;
Izaak Walton League of America;
Legal Environmental Assistance Foundation;
Michigan Environmental Council;
National Environmental Trust;
Natural Resources Council of Maine;
New York Public Interest Research Group;
Ohio Citizen Action;
Ohio Environmental Council;
U.S. Public Interest Research Group; and
Wisconsin's Environmental Decade Institute.

State of New York;
State of Connecticut;
State of Maine;
Commonwealth of Massachusetts
State of New Hampshire;
Commonwealth of Pennsylvania;
State of Rhode Island; and
State of Vermont.

State of Maryland.

State of Wisconsin.

Province of Ontario, Canada;
Norman W. Sterling, Minister of the Environment, Province of Ontario;

PARTIES TO THE PROCEEDINGS – Continued

Charles A. Harnick, Attorney General of the Province of Ontario; and
Christopher Carl Haromy.

Appalachian Power Company, *et al.* (listed in paragraph 1. *supra*).

Dairyland Power Cooperative.

Virginia Manufacturers Association.

South Carolina Public Service Authority, d/b/a Santee Cooper.

Detroit Public Lighting;
Grand Haven Board of Light and Power;
Holland Board of Public Works;
Lansing Board of Water and Light;
Marquette Board of Light and Power;
Michigan South Central Power Agency; and
City of Wyandotte Department of Municipal Service.

GPU Generation, Inc.

American Gas Association.

Interstate Natural Gas Association of America.

Network for Workable Air Policies.

Business Council of Alabama.

Michigan Manufacturers Association.

Consolidated Edison Co. of New York, Inc.;
KeySpan Generation LLC;
Niagara Mohawk Power Corporation;
PECO Energy Company;
Public Service Electric and Gas Company;
Rochester Gas & Electric Corporation; and
PG&E Generating.

PARTIES TO THE PROCEEDINGS – Continued

Natural Gas Supply Association; and
Sempra Energy.

Associated Industries of Massachusetts;
New England Council; and
New Jersey State Chamber of Commerce.

PP&L, Inc.;
Atlantic City Electric Company; and
Delmarva Power & Light Company.

4. The following were *Amici* in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

Government of Canada.

North Carolina Citizens for Business and Industry.

South Carolina Chamber of Commerce;
Environmental Management Association of South Carolina; and
South Carolina Manufacturers Alliance.

Toledo Metropolitan Area Council of Governments.

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BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

INTRODUCTION

Three petitions for certiorari have been filed seeking review of portions of a March 3, 2000 decision of the United States Court of Appeals for the District of Columbia ("D.C. Circuit").[1] That decision largely upheld the Environmental Protection Agency's ("EPA's" or the "Agency's") 1998 rule requiring reductions in nitrogen oxide ("NOx") emissions in 22 states and the District of Columbia that EPA found to be "contributing significantly" to the failure of many states in the Eastern United States to attain the 1-hour ozone National Ambient Air Quality Standard ("NAAQS"). "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 Fed. Reg. 57,356 (Oct. 27, 1998) (hereinafter "NOx SIP Call Rule" or "Rule"). In particular, the D.C. Circuit held that EPA, in determining the level of emissions that were contributing significantly to downwind nonattainment and thus needed to be reduced, properly considered the costs of controlling those emissions. All three petitions seek review of this finding on the grounds that it violates the Clean Air Act (the "Act"), although Petitioners do not agree on what approach Congress intended EPA to take. The States of Michigan, Alabama, West Virginia, Virginia

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[1] *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (*"Michigan"*), *reprinted at* Appendix of the Petition for a Writ of Certiorari of Appalachian Power Co., *et al.* (No. 00-445, Sept. 20, 2000) ("Ind. Pet., App.")

and South Carolina ("Michigan") (No. 00-632) assert that EPA cannot consider costs at all. The States of Ohio and Indiana ("Ohio") (No. 00-633), on the other hand, claim that EPA may consider costs, but only as a "subordinate factor."[2] Finally, a group of industries and industry trade associations led by Appalachian Power Company ("Industry" or "Industry Petitioners") (No. 00-445) claim that EPA may not consider costs when determining "significant contribution," but may do so when determining how much of that contribution must be eliminated. Industry Petitioners also claim that EPA's consideration of cost factors violated the so-called "non-delegation" doctrine.

Environmental group intervenor-respondents in the D.C. Circuit case below[3] respectfully submit that none of

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[2] State petitioners below were Ohio, Indiana, Michigan, Alabama, South Carolina, Virginia, West Virginia and North Carolina. These states combined their efforts in briefing and arguing the case before the D.C. Circuit. North Carolina has not filed a petition for certiorari with this Court, and Ohio and Indiana have filed a petition separate from that filed by Michigan, Alabama, South Carolina, Virginia and West Virginia.

[3] Environmental organizations participating as intervenor-respondents in the case below, and who join in this Opposition are: American Lung Association of Metropolitan Chicago, Appalachian Mountain Club, Citizens Action Coalition of Indiana, Clean Air Council, Environmental Defense (formerly known as Environmental Defense Fund), Environmental Law & Policy Center of the Midwest, Group Against Smog and Pollution ("GASP"), Hoosier Environmental Council, Illinois Environmental Council, Izaak Walton League of America, Legal Environmental Assistance Foundation, Michigan Environmental Council, National Environmental Trust, Natural Resources Council of Maine, Natural Resources Defense

these petitions merit this Court's review. There is no conflict between the D.C. Circuit's decision and decisions of this Court or other federal appellate courts. The D.C. Circuit's resolution of the questions presented in the certiorari petitions is amply supported by applicable precedent and is correct.

STATEMENT OF THE CASE

Petitioners' Statements describe EPA's authority to implement the NAAQS for ozone through issuance of a "SIP call" under Clean Air Act Section 110(k)(5), by which the EPA Administrator may find inadequate state implementation plans ("SIPs") and require states to revise such SIPs to correct the deficiencies. 42 U.S.C. § 7410(k)(5). One of the possible bases for a SIP call is an EPA finding under Section 110(a)(2)(D)(i)(I) of the Act that a SIP does not contain adequate provisions to prohibit air pollution in that state "in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance [of a NAAQS] by, any other State." 42 U.S.C. § 7410(a)(2)(D)(i)(I). These provisions are designed to ensure that the cumulative impacts of many states' upwind air pollution do not foul the air downwind so badly that any downwind state is forced to bear more than its share of the burden of ensuring that its air does not violate the NAAQS; or alternatively, bear more than

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Council, New York Public Interest Research Group, Ohio Citizen Action, Ohio Environmental Council, U.S. Public Interest Research Group, and Wisconsin's Environmental Decade Institute.

its share of the public health consequences of dirty air. *See* S.Rep. No. 95-127 at 41-42, *reprinted in* 3 A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Leg. Hist.") 1415-16 (Comm. Print 1978).

In the case of the ozone NAAQS, each upwind area contributes to the total ozone burden in downwind areas in many states. 63 Fed.Reg. 57,356, 57,394-396, Tables II-4 to II-7. Put another way, because of the nature of ozone pollution and its transport, the pollution in any upwind area will impact the area and the state immediately downwind as well as more distant states.

Ozone is formed when NOx and volatile organic compounds ("VOCs") interact in the presence of sunlight. Once ozone has been created, it drifts downwind, along with its NOx precursor (VOCs are very localized in their effects, and are not transported with the air mass to any great extent). *Id.* at 57,381. The D.C. Circuit has correctly recognized that "as the air mass moves [downwind], ozone levels often continue to increase, in part because ozone has more time to develop, in part because the air mass picks up more precursors along the way. Ultimately, this process can bring high ozone levels to areas hundreds of miles downwind of the pollution sources." *Virginia v. EPA*, 108 F.3d 1397, 1400, *modified on reh'g on other grounds*, 116 F.3d 499 (D.C. Cir. 1997). The creation of downwind ozone pollution therefore is non-linear and cumulative.[4] For each separate meteorological ozone

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[4] Petitioners argue that NOx, the precursor chemical primarily associated with transported ozone, both creates and destroys ozone. Ind. Pet. at 8 & n. 4. This statement is incorrect – although strictly localized increases in ozone can occur in areas immediately adjacent to facilities which reduce their NOx

event, downwind areas receive ozone and NOx from many upwind states, and each upwind area contributes to downwind pollution events in many different states. 63 Fed. Reg. 57,356, 57,394-396.

The NOx SIP Call Rule was a partial response – five years overdue – to the mandate contained in the 1990 Clean Air Act that all states with ozone serious nonattainment areas must adopt plans no later than November 1994 to correct the nonattainment problem. 42 U.S.C § 7511a(c)(2). As part of a negotiated stay of litigation over EPA's extensions to states of the statutory attainment demonstration deadlines, the Ozone Transport Assessment Group ("OTAG") was created. 62 Fed. Reg. 60,318, 60,323 (Nov. 7, 1997). In OTAG, 37 states came together to complete regional modeling and reach regional solutions to the interstate ozone transport problem. The technical work done by OTAG utilized "the most complete, scientifically-credible tools and data available" (*id.* at 60,331), and included state-of-the-art air quality modeling, at the regional and subregional levels, to which EPA added state-specific refinements. 63 Fed. Reg. 57,356, 57,387, 57,390-391.

The combination of the cumulative, nonlinear nature of ozone production and the Agency's statutorily-defined duty under Sections 110(a)(2)(D)(i)(I) and 110(k)(5) of the Act meant that EPA, faced with OTAG's indisputable

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emissions, it is not correct to say that NOx "destroys" ozone in any sense. Indeed, *transported* ozone – the subject of the EPA Rule and this case, does not decrease when NOx emissions are increased; rather transported ozone decreases when NOx emissions are *decreased*. *See* 63 Fed. Reg. 57,356, 57,424-425, 57,439-441.

evidence of pollutant transport across state lines, was required to distribute responsibility among all the upwind states to adopt controls on sources contributing to ozone nonattainment and maintenance problems in all downwind states.

EPA implemented the OTAG findings, making a state-by-state assessment of emissions contributions to downwind nonattainment and maintenance problems, and apportioning responsibility for the needed NOx reductions based on the emissions modeling and the availability of additional highly cost-effective controls in each of the states. *Id.* at 57,376-378, 57,389-391. From this multi-faceted analysis, EPA developed state-by-state NOx emissions "budgets," which each state may meet by any means available to it. *Id.* at 57,426.

State and Industry Petitioners challenged EPA's resulting NOx SIP Call Rule in the D.C. Circuit, alleging that the Agency's consideration of the availability of cost-effective control measures in defining significant contributions from upwind to downwind states violated the Clean Air Act. State Petitioners also argued that EPA's actions violated the Constitutional non-delegation doctrine.

The D.C. Circuit upheld the EPA Rule on both counts, noting that the term "significant" does not require an unidimensional (health only) analysis, and that the various petitioners were not only in conflict over this point, but had "conspicuously fail[ed] to describe the intellectual process by which EPA would determine 'significance' if it may consider only health." Ind. Pet., App. at 21a, 22a. The court went on to hold that there is nothing in the D.C. Circuit's case law, or in "the text, structure, or

history of the Clean Air Act that bars EPA from considering cost" in this analysis. Ind. Pet., App. at 25a.

On the non-delegation question, the State Petitioners did not allege that the Clean Air Act itself violated the non-delegation doctrine, but rather challenged as an unbounded exercise of Agency discretion the EPA's action in selecting the $2000/ton cost-effectiveness point as an element of the significance determination. The D.C. Circuit upheld the Agency's action against this charge, noting that the non-delegation doctrine is itself limited in its application. It was significant to the court that the Agency's action was both constrained by the statutory factors of the significance analysis, and limited geographically, so that the scope of the Rule did not " 'encompass all American enterprise'." Ind. Pet., App. at 27a-28a (quoting *International Union, UAW v. OSHA ("Lockout/Tagout I")*, 938 F.2d 1310, 1317 (D.C. Cir. 1991)). The D.C. Circuit refused requests for rehearing *en banc*, over a single dissent.[5]

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[5] Judge Sentelle dissented, as he had on the merits. Judges Tatel and Garland did not participate in considering whether to grant rehearing *en banc*. Order Denying Reh'g *En Banc* in No. 98-1497 and consolidated cases, June 22, 2000, *reprinted at* Ind. Pet., App. at 64a.

REASONS FOR REJECTING THE PETITIONS FOR REVIEW

I. THIS COURT SHOULD DENY CERTIORARI ON THE "SIGNIFICANT CONTRIBUTION" QUESTIONS.

The only question raised by the Petitions of Ohio and Michigan, and the primary one raised by that of Industry, is whether – or how much – EPA may consider cost as a factor in finding that certain sources are producing NOx emissions that "contribute significantly" to nonattainment in another state within the meaning of Section 110(a)(2)(D)(i)(I) of the Act. As discussed *infra* at Section I.B., Congress did not define the term "contribute significantly." Therefore, EPA's interpretation of the term is entitled to considerable weight under the settled law of this Court, and should be upheld unless it is impermissible. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984) ("*Chevron*"). In other words, this is a case that is properly decided under "step two" of the *Chevron* analysis, not "step one." The D.C. Circuit's decision finding permissible EPA's inclusion of cost in the factors considered in determining the significance level of upwind state contributions to downwind nonattainment is completely consistent with the established case law of this Court and the Courts of Appeals.

As the D.C. Circuit noted, in the proceeding below neither the State nor Industry Petitioners could make up their minds as to whether or how Congress intended EPA to consider cost in determining what contributions to nonattainment are "significant." *See* Ind. Pet., App. at

17a-20a. Initially, the States argued that EPA could consider cost, but could not make it the controlling factor in determining significance. *Id.* However, "[a]t oral argument, counsel for the States abandoned this position and decided that the statute flatly prohibits EPA from considering costs at all." Ind. Pet., App. at 18a-19a. On the other hand, Industry initially argued below that EPA could consider only "air quality impacts," not costs. Industry presented a different position at oral argument, however, claiming that while EPA could not consider costs under Section 110(a)(2)(D) of the Act (in determining whether a SIP prohibits emissions from sources that "significantly contribute" to nonattainment), it nevertheless could consider costs under Section 110(k)(5) (in determining whether a SIP is "adequate"). Ind. Pet., App. at 20a.

Petitioners still do not agree on how Congress intended EPA to treat costs in issuing a "SIP call" under Sections 110(a)(2)(D) and 110(k)(5) of the Act, presenting three inconsistent positions to this Court. Industry's Petition argues that EPA may consider cost in determining the proper level of emission reductions required to correct an interstate pollution transport problem, but only under Section 110(k)(5)'s adequate mitigation language and not under Section 110(a)(2)(D)'s significant contribution language. Ind. Pet. at 13, 18. The State Petitions now contain two distinct variations of the cost argument. The Michigan Petition argues that EPA cannot consider cost at all. Michigan Pet. at 12-13, 19. On the other hand, the Ohio Petition appears to argue that cost may be a factor in EPA's determination of what contributions are significant, but only a subordinate factor. Ohio Pet. at 11, 15. Different petitioners have the right, of course, to raise

different theories of their case. But in this case these disparate interpretations raise the obvious question – if Congressional intent here is so clear, then why can't Petitioners agree on what that intent was?

A. The D.C. Circuit's Holding that EPA's Interpretation of "Significant Contribution" is Permissible Does Not Conflict with the Decisions of this Court or with Other Decisions of the D.C. Circuit.

Petitioners claim that the D.C. Circuit's decision upholding EPA's consideration of cost as a factor in determining when a contribution to downwind nonattainment is "significant" conflicts with various decisions of this Court and other decisions of the D.C. Circuit. Petitioners are wrong.

First, Petitioners claim that the lower court's decision conflicts with the decision of this Court in *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976) (*"Union Electric"*). *See* Michigan Pet. at 14-19. However, *Union Electric* is not on point here. In that case, this Court was faced with a polluter's challenge to EPA's approval of a SIP on the grounds that EPA was required to consider whether the state's choice of controls in the SIP were economically or technologically infeasible. This Court upheld EPA's position[6] that it was not authorized to reject a SIP on such grounds, finding that Congress had set out minimum requirements that a SIP must meet in order to obtain EPA approval, and

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[6] The Court noted that "we have previously accorded great deference to the Administrator's construction of the Clean Air Act [citations omitted]." *Union Elec.*, 427 U.S. at 256.

that the three-year deadline for achieving the NAAQS set by Congress "leaves no room for claims of technological or economic infeasibility." *Union Elec.*, 427 U.S. at 256-260. The Court stated that the Act's minimum compliance requirements are of a "technology-forcing" nature, and "are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Id.* at 257. The Court also made clear, however, that as long as a state plan would achieve attainment and meet the minimum requirements of the Act, the states were free to choose particular measures needed to accomplish that task, and were free to consider infeasibility claims in so doing. *Id.* at 260-265. Indeed, the Court stated explicitly that "we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan. . . . " *Id.* at 266.

The instant case is entirely different from *Union Electric*. Neither the EPA nor the Court is faced here, as the Court was in *Union Electric*, with the implications of the "technology-forcing" character of the Act's attainment requirements. We are not concerned here with the question of whether all measures that are or could be contained in an implementation plan will in the aggregate be adequate to achieve timely attainment of the ozone NAAQS,[7] or whether additional measures that may not

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[7] As the Court recognized in *Union Electric*, "the [Act does] allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national standards." *Union Elec.*, 427 U.S. at 266.

be technologically or economically feasible must be included in such a plan.

Attainment of the NAAQS in a state impacted by emissions transported across its borders requires a combination of in-state and upwind state emission control measures. Section 110(a)(2)(D) does not place the entire burden of downwind attainment on upwind states, because it does not require the elimination of all upwind emissions necessary for a downwind state to achieve attainment.[8] If it did, *Union Electric* might well prohibit EPA from considering cost in determining the level of required upwind emission reductions, at least if the effect of such consideration would be the failure to achieve downwind attainment. Here, however, Congress has authorized EPA to require the elimination of some – but not all – upwind emissions, specifically those that "contribute significantly" to downwind attainment problems. In this sense, Section 110(a)(2)(D)(i)(I) is similar to other provisions in the Act that specifically target certain emissions or emission sources that represent but a portion of the overall reductions necessary to achieve attainment. In the context of such specific implementation measures, EPA has often been permitted, and in some cases,

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[8] EPA so stated in the NOx SIP Call Rule, noting that even after implementation of its rulemaking reducing upwind emissions, some downwind areas will require additional local reductions. *See*, 63 Fed. Reg. 57,356, 57,374, 57,377, 57,403.

required, to consider issues of technological and economic feasibility, or of cost or cost-effectiveness.[9]

Furthermore, unlike *Union Electric*, this case does not involve a claim that a state's choice of emission controls in its implementation plan is technologically or economically infeasible. Indeed, this case does not deal with a state's choice of emission controls at all. Rather, this case involves EPA's interpretation of its own authority to find that a state has failed to control interstate emissions as mandated by Congress and to impose a remedy for that failure.[10] Finally, the present case does not deal with claims of technical or economic infeasibility, but rather

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[9] For cases in which the D.C. Circuit has found that EPA can lawfully consider costs in Clean Air Act rulemaking, *see, e.g., George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999) (examining Clean Air Act Section 211, 42 U.S.C. § 7545, providing for the regulation of reformulated gasoline); *NRDC v. EPA*, 937 F.2d 641 (D.C. Cir. 1991) (upholding EPA's use of cost-benefit analysis to determine that a particular polluting source should not be classified as "major" under Section 165 of the Act, 42 U.S.C. § 7475).

Congress also has specifically allowed or required EPA to consider costs in connection with a variety of specific emission reduction measures; *see, e.g.*, 42 U.S.C. § 7521(a)(3)(A)(i) (mobile source standards); 42 U.S.C. § 7545(c)(2)(B) (fuel additive regulation); 42 U.S.C. § 7411(a)(1), (b)(1) (certain new stationary source standards); 42 U.S.C. § 7547(a)(3) (nonroad vehicle compliance deadlines); 42 U.S.C. § 7571(b) (aircraft compliance deadlines); and 42 U.S.C. § 7511b(b)(3) and (4), (e)(1) (certain control techniques guidelines for VOCs).

[10] This Court in *Union Electric* explicitly did not reach the question of whether EPA could consider factors of economic or technical infeasibility in drafting its own implementation plan where a state fails to do so. *Union Elec.*, 427 U.S. at 261, n.7.

with issues of cost and cost-effectiveness.[11] For all of the above reasons, *Union Electric* does not conflict with the lower court's holding here.[12]

The decision of the D.C. Circuit in this case furthermore does not conflict with other decisions of that court.[13] First of all, contrary to the claims of Michigan Petitioners, there is no conflict with *American Trucking Ass'ns v. Browner*, 175 F.3d 1027, *modified on reh'g*, 195 F.3d

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[11] In another Clean Air Act case presently before this Court, *American Trucking Ass'ns v. Browner*, No. 99-1426, several industry petitioners recently argued that *Union Electric* "never mentions cost-benefit analysis," and "could not be clearer that it dealt only with 'technological and economic infeasibility.' " Reply Brief for Cross-Petitioners (ATA, et al.) in No. 99-1426, at 16-17 (Oct. 6, 2000) (citation omitted).

[12] Several other opinions of this Court mentioned in passing by Industry do not support its arguments here. *See* Ind. Pet. at 16-17. First, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) was concerned with retroactive agency rulemaking under the Medicare program, and is not relevant here because EPA's NOx SIP Call Rule is not retroactive rulemaking. Nor is *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) of any assistance to Petitioners. In that case, a divided Court struck down the Secretary of Labor's proposed benzene regulations, finding that "Congress was concerned, not with absolute safety, but with the elimination of significant harm." *Id.* at 646. Indeed, the Court found that the statutory requirement that the Secretary conduct "some cost-benefit analysis" prior to setting a standard manifested the intention of Congress that the Secretary must find a "significant risk of harm." *Id.* at 644. The Court clearly did not find that the Secretary could not consider costs in setting a standard.

[13] We note that there was not a close split of D.C. Circuit judges in this case. Indeed, only a single judge would have granted the petitions for *en banc* rehearing. Ind. Pet., App. at 64a-65a.

4 (D.C. Cir. 1999), *cert. granted*, 120 S.Ct. 2003, 2193 (2000) (Nos. 99-1426, 99-1257) (*"ATA"*), or *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) (*"Lead Industries"*). Neither *ATA* nor *Lead Industries* is relevant to the present case, as both were concerned with the promulgation of NAAQS under Section 109 of the Act, 42 U.S.C. § 7409, not the implementation of the resulting standards.[14] These two cases are part of a long line of D.C. Circuit cases that have consistently found that "[t]he statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead*

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[14] The plain language of Section 109(b)(1) makes clear that the NAAQS must be set "based on" "air quality criteria" established under Section 108, 42 U.S.C. § 7408, and must be "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The air quality criteria, in turn, "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(2). The Act's legislative history provides clear evidence that Congress intended EPA to be limited to public health considerations when setting NAAQS. Thus, both the statute and legislative history provide that the establishment of the primary, health-based, NAAQS are confined to public health considerations. *See* Brief of Cross-Respondent American Lung Ass'n in *ATA*, No. 99-1426 (September 8, 2000). Further, Congress has ratified this long-standing interpretation of EPA's authority to establish NAAQS through repeated legislative proceedings over the past three decades in which it has considered and rejected initiatives to provide for the consideration of costs in establishing the NAAQS. *See* Brief of *Amici Curiae* Environmental Defense, American Public Health Association, *et al.* on Behalf of Cross-Respondents, in *ATA* No. 99-1426, at 5-15 (September 11, 2000).

Indus., 647 F.2d at 1148. *See also, e.g., American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982); *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991); and *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Because Congress has often – both explicitly and implicitly – authorized EPA to consider cost-related factors in *implementing* the NAAQS, cases such as *ATA* and *Lead Industries* dealing with the use of such factors in *promulgating* the NAAQS are simply not relevant to the issues raised by Petitioners here.[15] The various D.C. Circuit opinions addressing when EPA may take cost into consideration under different Clean Air Act provisions hardly constitute the "hodge-podge" alleged by Industry. *See* Ind. Pet. at 6. Rather, these cases divide along clear lines – EPA cannot consider costs when promulgating an air quality standard, but may, and in some cases, must, do so in implementing such a standard.[16]

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[15] *See* examples cited at footnote 9, *supra*. We also note that Michigan, *et al.*, argue that "EPA's consideration of costs under § 110(a)(2)(D) is wholly inconsistent with the position the EPA adopted before this Court in the EPA's petition for a writ of certiorari in *ATA*." Michigan Pet. at 8. But, in fact, EPA's positions in *ATA* and in this case are perfectly compatible: ATA deals with the promulgation of the NAAQS under Section 109, where consideration of costs has long and properly been excluded, while the instant case deals with the implementation of the NAAQS, where EPA's consideration of costs have often been upheld.

[16] The D.C. Circuit's opinion in *NRDC v. EPA*, 824 F.2d 1146, 1157 (D.C. Cir. 1987) (*en banc*), referenced in the Industry Petition at 7, was concerned with EPA's establishment of limits on source emissions of hazardous air pollutants under an earlier version of Section 112 of the Act, not with the promulgation of ambient air quality standards under Section 109.

The D.C. Circuit's ruling here also does not conflict with its decision in *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995) ("*Ethyl*"), as argued by Industry. Ind. Pet. at 17-18. *Ethyl* dealt with Section 211(f)(4) of the Act, 42 U.S.C. § 7545(f)(4), authorizing EPA to grant a waiver from the prohibition on the use of certain fuel additives if the manufacturer could show that the additive "will not cause or contribute to a failure of any emission device or control system . . . to achieve compliance by the vehicle with the emission standards." EPA decided that Ethyl Corporation had made the above showings, but nevertheless denied the waiver on the grounds that EPA could consider other factors such as whether the waiver was consistent with the public interest and the effects of the additive on public health. *Ethyl*, 51 F.3d at 1054-55. Noting that EPA had specifically determined that Ethyl Corporation met the explicit statutory criteria, that EPA's waiver denial was inconsistent with its published guidance and indeed that this was the first waiver case where EPA had considered factors other than those set forth in Section 211(f)(4), the D.C. Circuit held that given the plain meaning of the statute, EPA erred in considering those other factors. *Ethyl*, 51 F.3d at 1056, 1058. In this case, Section 110(a)(2)(D) does not provide a set of exclusive criteria that controls EPA's determination of the level of emissions that "significantly contribute" to downwind nonattainment and must be "adequately mitigated" under Section 110(k)(5). The use by Congress of these undefined terms permits EPA discretion in interpreting them, unlike the very explicit language in Section 211(f)(4) that the court in *Ethyl* determined provided EPA with very little discretion.

B. EPA's Consideration of Costs Under Sections 110(a)(2)(D) and 110(k)(5) Is Permissible Under Established Case Law.

This is not a case where the lower court has committed a clear error of law on an important or novel legal question. Rather, the "significant contribution" issue is easily resolved under the well-established rules of statutory construction set out in *Chevron* and its progeny. Since *Chevron*, federal courts have used a two-part test to review an agency's construction of a statute that it administers. This test is described in *Chevron* as follows:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [footnotes omitted].

Chevron, 467 U.S. at 842-43. Furthermore, in examining this second question, *Chevron* provides that the Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . . *Id.* at 844.

The issue raised by Petitioners in this case is whether EPA may consider costs in carrying out its obligations to ensure that SIPs adequately address interstate emissions

under Sections 110(a)(2)(D) and 110(k)(5) of the Act. Congress has not defined the phrase "contribute significantly" in Section 110(a)(2)(D). It has not defined when a SIP is "substantially inadequate" or when a plan will "mitigate adequately" interstate pollution transport within the meaning of Section 110(k)(5). Nor has Congress enumerated the factors that EPA must consider when determining whether a state's emissions contribute significantly to downwind nonattainment or how much emissions reduction is needed to mitigate adequately such contributions. Congress clearly has not prohibited EPA from considering cost factors in making either of these determinations. As mentioned earlier, Petitioners' inability to agree on whether and to what extent Congress did intend EPA to consider costs in requiring interstate emissions reductions pursuant to Sections 110(a)(2)(D) and 110(k)(5) of the Act speaks volumes to the lack of any clear Congressional direction on this issue. As the D.C. Circuit observed, "[a]gainst this backdrop, it would be at the very least ironic for us to say that there is 'clear congressional intent to preclude consideration of cost' under § 110(a)(2)(D)" Ind. Pet., App. at 20a (quoting *NRDC v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (*en banc*)). Because Congress has not directly addressed the precise question of whether costs may be considered under Sections 110(a)(2)(D) and 110(k)(5), EPA's resolution of that question is properly reviewed under step two of *Chevron*.

While EPA's interpretation of Sections 110(a)(2)(D) and 110(k)(5) may not be the only possible one, it is a reasonable one and therefore is permissible under *Chevron's* second step. 467 U.S. at 837. EPA considered a

variety of air-quality related factors,[17] based on the most sophisticated modeling available, in addition to the availability of cost-effective controls, in its multi-factor approach to "significant contribution." *See* 63 Fed. Reg. 57,356, 57,376-379. Cost was *not* the sole factor considered.

Furthermore, no one disputes that the failure of many areas in the Eastern United States to attain the ozone standard almost 30 years after it was first promulgated is due to contributions from both local (in-state) and upwind (out-of-state) emissions sources.[18] The basic structure of Section 110(a)(2)(D) requires EPA to include an assessment of the relative level of control efforts in the upwind and downwind states as part of its determination of whether a state's contribution is significant. Unless EPA were to interpret Section 110(a)(2)(D)(i)(I) as prohibiting *all* upwind emissions that impacted downwind nonattainment in any way (an interpretation that no party thus far has advocated in this case), EPA had to interpret the Congressional prohibition of significantly contributing emissions in such a way that, among other things, reasonably allocated responsibility between upwind and

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[17] EPA considered the following air quality factors:

"[t]he overall nature of the ozone problem . . . ;"

"the extent of the downwind nonattainment problems to which the upwind State's emissions are linked, including the ambient impact of controls required under the CAA or otherwise implemented in downwind areas;" and

"the ambient impact of the emissions from the upwind State's sources on the downwind nonattainment problems." 63 Fed. Reg. 57,356, 57,376. *See also* 62 Fed. Reg. 60,318, 60,325.

[18] *See* Ind. Pet. at 8-9; Ohio Pet. at 8.

downwind states, and among different upwind states themselves. EPA's consideration of cost in this context was a perfectly reasonable means to equitably allocate the burden of emissions reductions among the numerous states contributing to the problem.

If EPA did not consider costs and instead adopted a "bright-line" emissions contribution test as urged by some Petitioners,[19] the economic burden of compliance throughout the eastern United States could be quite disparate. Such a test could mean that a downwind state that had already adopted stringent controls would be forced to adopt even more stringent controls while upwind states could escape even basic – and much more cost-effective – controls.[20] On the other hand, if the "bright line" emissions contribution level were set low enough, the reverse could occur – that is, upwind states would bear a disproportionate share of the emissions reductions burden while downwind states would incur no responsibility. Of course, the same disparities could occur between different upwind states as well. In addressing the implications of Petitioners' arguments below, the D.C. Circuit noted that "counsel eventually went so far as to claim that if faced with two states, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost of less than $5000 a

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[19] *See* Ohio Pet. at 9.

[20] Indeed, EPA found that additional downwind controls would cost about $4300 per ton of NOx removed, while the regional reductions required by EPA's rule would cost only approximately $1500 per ton removed. 63 Fed. Reg. 57,356, 57,379.

ton, EPA must mandate the same cutback for each." Ind. Pet., App. at 19a.

Petitioners provide absolutely no evidence that Congress intended that EPA adopt such an approach to addressing the problem of interstate transport under Sections 110(a)(2)(D) and 110(k)(5). Rather, Congress intended quite the opposite. For example, when Congress added one predecessor to Section 110(a)(2)(D), Senate commenters noted that the new provisions were "intended to equalize the positions of the States with respect to interstate pollution," and to ameliorate previously existing "distinct economic and competitive disadvantage[s]." S. Rep. No. 95-127 at 41-42, *reprinted* in 3 1977 Leg. Hist. 1415-16. Thus, factoring cost-effectiveness into the assessment of significance allowed EPA to respond to dual directives presented it by Congress: prohibit all significant contribution, and take the equities of the situation into account in allocating responsibility for the ozone problem among different states in a region.

II. THERE ARE NO GROUNDS FOR A GRANT OF CERTIORARI ON THE NON-DELEGATION DOCTRINE QUESTION

Industry Petitioners' argument that this Court should grant certiorari to review the D.C. Circuit's decision on the State Petitioners' non-delegation doctrine challenge is meritless. Industry Petitioners fail to identify any conflict between the D.C. Circuit's ultimate decision in *Michigan* and the non-delegation jurisprudence of this Court, nor

do they identify any conflict within the D.C. Circuit's jurisprudence.[21]

A. There is No Conflict Between the D.C. Circuit's Holding and This Court's Non-Delegation Doctrine Jurisprudence.

Industry Petitioners, for the first time in this case,[22] raise their claim that EPA's analysis of significant contribution is a constitutionally-impermissible exercise by the Agency of the authority delegated to it by Congress. The D.C. Circuit determined that EPA's significant contribution analysis did not represent a constitutionally impermissible exercise of Agency discretion, and therefore did not run afoul of the nondelegation doctrine, because the Agency's assessment of significance was confined by several technical threshold determinations, and because the resulting rule was limited in its scope. Ind. Pet., App. at 27a-28a.

While Industry baldly claims that the D.C. Circuit has "turned upside-down the principle of unconstitutional delegation," they completely fail to describe any conflict between the D.C. Circuit's ultimate decision on this point and this Court's nondelegation jurisprudence. Indeed, it is Industry Petitioners (and the State Petitioners in the case below) who attempt to "turn the

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[21] Petitioners do not assert that any conflict exists between the D.C. Circuit's *Michigan* holding and decisions of any other Circuit Courts of Appeals.

[22] Industry Petitioners did not raise their nondelegation argument before the D.C. Circuit; State Petitioners did raise the issue below, but do not seek certiorari on that point.

nondelegation doctrine on its head" by using it to analyze Agency actions under delegated authority, rather than to examine the Congressional delegation of authority itself. The nondelegation doctrine consistently has been used by this Court as a constraint on Congressional, not administrative action.[23] Moreover, the Court is currently reviewing the D.C. Circuit's application of the non-delegation doctrine in the context of the Clean Air Act. *ATA*, No. 99-1257.

Assuming, *arguendo*, that it was appropriate for the D.C. Circuit to apply the nondelegation doctrine to analyze the Agency's action in issuing the NOx SIP Call, it is clear that the D.C. Circuit's *Michigan* holding is consistent with this Court's jurisprudence. This Court's nondelegation cases recognize that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The interstate transport of ozone pollution and its NOx precursor absolutely is the kind of complex technical problem for which the delegation to an agency with substantial technical and scientific expertise is appropriate.

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[23] *See e.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) (the purpose of the nondelegation doctrine is to ensure that important policy choices are made by *Congress*, and that *Congress* has provided "intelligible principles" to guide agency action).

Furthermore, this Court's analysis has never ended at the question whether the delegation of authority to an agency is broad or limited – the Court looks to the overall scope of the delegated authority and the statutory context in which the rules under it are developed. Indeed, agency actions under statutes including broad delegations of authority have consistently been upheld. *Loving v. United States*, 517 U.S. 748, 771 (1996) (*citing National Broad. Co. v. United States*, 319 U.S. 190, 216-217, 225-26 (1943)). There have been only two instances in the history of the non-delegation doctrine in which this Court has struck down a Congressional delegation of authority, and in each of those cases the concern was with completely standardless or limitless delegation, not simply the grant of broad authority.[24] But EPA's decisionmaking in the NOx SIP Call was neither standardless nor limitless – the D.C. Circuit found the Agency had constrained its discretion both by the factors it used to bound its significance analysis, and by the limited geographic scope of the Rule.

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[24] *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 418, 420, 431-32 (1935); *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 537-542 & 553 (1935) (Cardozo, J. concurring and noting particular concern where the delegated authority extends "as wide as the field of industrial regulation."). And even in *Panama* and *Schecter*, the Court recognized that "legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly." *Panama*, 293 U.S. at 248; *Schecter*, 295 U.S. 495, 529-530. That is precisely the situation presented here – EPA has been delegated a complex problem to solve – a problem involving a host of technical details that Congress could not have efficiently or expertly addressed itself.

Moreover, the delegation of authority to EPA under Sections 110(a)(2)(D)(i)(I) and 110(k)(5) was specifically limited by Congress. Clear boundaries confine EPA's exercise of its discretion in the NOx SIP Call Rule, including the following recognized by the D.C. Circuit: "EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment." Ind. Pet., App. at 28a.

The court also found that because the resulting NOx SIP Call Rule did not "affect the whole economy," a more precise set of standards confining the Agency's action was unnecessary. *Id.* Whatever else one may think of this analysis, it is completely consistent with this Court's nondelegation jurisprudence, which examines not only the standards governing agency action, but the scope of the delegated power. *See, e.g., Synar v. United States*, 626 F. Supp. 1374, 1386 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986) (constitutionality of a delegation must be assessed both on the basis of the specificity of the standards governing its exercise and the overall scope of the power granted).

B. The D.C. Circuit's Holding Does Not Represent an Intra-Circuit Conflict.

Industry Petitioners paint a picture of the D.C. Circuit in conflict with itself that is simply incorrect. They allege that the *Michigan* decision is somehow at odds with the D.C. Circuit's previous decisions, particularly *ATA*.

While we disagree strongly with the D. C. Circuit's decision in *ATA*, it certainly is not in conflict with the decision in *Michigan* on the grounds asserted by Industry Petitioners.[25]

The *Michigan* court upheld the Agency's exercise of its authority under a broad delegation not only because the Agency's action was confined by articulated standards,[26] Ind. Pet., App. at 28a, but also because the

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[25] In earlier D.C. Circuit decisions upholding previous EPA significant contribution determinations under the Act, the nondelegation doctrine was not even at issue. *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988); *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775 (D.C. Cir. 1976).

[26] This point is ignored by Industry Petitioners, who simply seize the court's *dicta* (namely the statement that the selection by EPA of the $2000/ton cost-effectiveness cutoff as one element of the significance analysis "is a radically incomplete line-drawing device") to allege an exercise of standardless discretion. Ind. Pet. at 20. But Industry Petitioners significantly fail to note that the court went on to find that EPA had properly limited its action under the statute through three threshold determinations. Ind. Pet., App. at 28a.

Furthermore, while we agree with the D.C. Circuit that EPA's NOx SIP Call Rule was a valid exercise of delegated Agency authority, we do not agree with the court's *dictum* that EPA "understood that its selection of the [cost] cut-off point was essentially unbounded." Ind. Pet., App. at 27a. EPA did not simply pick the $2000/ton figure out of thin air. Rather, it evaluated the cost of NOx emission control options, and found that most "emissions controls that are available and of comparable cost to other recently undertaken or planned NOx [controls] . . . fall below $2000/ton." 63 Fed. Reg. 57,356, 57,400. EPA further explained that "the cost-effectiveness of measures that EPA or States have adopted, or proposed to adopt, forms a good reference point for determining which of the available additional NOx control measures can most easily be

resulting Rule is limited in scope both geographically and because it does not affect all American enterprise. *Id.* at 27a-28a. Industry Petitioners erroneously suggest that this represents a new or different approach taken by the D.C. Circuit to its analysis of agency action under the nondelegation doctrine. Ind. Pet. at 20. It is notable that they provide no citations illustrating the conflict they suggest.

In fact, the court's *Michigan* analysis is completely consistent with previous cases in which the D.C. Circuit (wrongly, we believe) has used the nondelegation doctrine to analyze agency actions under Congressionally-delegated authority. In *ATA*, the court noted its view that where the Agency "standards in question affect the whole economy," a more precise delegation (or more accurately to the situation, a decisional principle more clearly articulated by the Agency) is required. *ATA*, 175 F.3d at 1037 (citing *Schecter*, 295 U.S. 495, 553 (1935)). Similarly, in *Lockout/Tagout I*, 938 F.2d at 1317 (D.C. Cir. 1991), the court remanded a rule precisely because the scope of the agency's claimed power to roam was "immense, encompassing all American enterprise," and, the D.C. Circuit believed, this ran afoul of the nondelegation doctrine. The *Michigan* court, distinguishing those earlier holdings,

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implemented by upwind states whose emissions impact downwind nonattainment problems." *Id.* This approach is analogous to various provisions in the Act requiring sources to install emission control technology that is "reasonably available." *See, e.g.*, 42 U.S.C. § 7502(c)(1) (requiring major sources in ozone nonattainment areas to install "reasonably available control technology").

held not only that the Agency had constrained its decisionmaking,[27] but that the resulting rule does not affect the whole economy. Ind. Pet., App. 28a. *Michigan* therefore does not represent a new approach by the D.C. Circuit, nor is it in conflict with its earlier decisions, and therefore is not worthy of a grant of certiorari by this Court.

More importantly, as noted *supra*, this Court currently is reviewing an important Clean Air Act case in which both the ultimate results of the D.C. Circuit's non-delegation doctrine analysis and its reasoning were inconsistent with this Court's non-delegation jurisprudence. *ATA*, No. 99-1257. That case provides this Court ample opportunity to evaluate how the D.C. Circuit is applying the non-delegation doctrine, making review of the instant case unnecessary.

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[27] In fact, the court's concern in *Lockout/Tagout I*, that the agency's asserted power to make a rule so stringent as to risk taking industry to the verge of economic ruin, *see Lockout/Tagout I*, 938 F.2d at 1317, is clearly not at issue here, where EPA has included the availability of cost-effective NOx controls as one limiting element in its significance determination.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari on the questions presented in the State and Industry Petitions.

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IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (PROVINCE OF ONTARIO, CANADA) IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Environmental Protection Agency ("EPA") acted reasonably and in accordance with Section 110(a)(2)(D)(i)(I) of the Clean Air Act when it relied on its general rulemaking authority to consider cost-effectiveness in ascertaining the amount of emissions from upwind states which "contribute significantly" to non-attainment of ozone pollution standards in downwind states.

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RULES AND REGULATIONS

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STATEMENT OF THE CASE

The Province of Ontario will adopt the Statement of the Case in the Brief in Opposition filed by Respondent EPA. In addition, Ontario presents the following supplementary facts.

1. NOx EMISSIONS FROM THE UNITED STATES CAUSE INCREASED GROUND-LEVEL OZONE IN ONTARIO

The NOx SIP Call Rule upheld by the Court of Appeals for the District of Columbia Circuit in this case (63 Fed. Reg. 57,356 (Oct. 27, 1998)) will have the effect of reducing nitrogen oxide ("NOx") emissions and ground-level ozone transported within the United States and, because of prevailing winds, also transported to the United States' neighbor, the Province of Ontario, Canada.

Ontario has the largest population of any of the Canadian provinces, and the majority of the Ontario population is concentrated in the southern part of the Province, in the Great Lakes region. This region receives the most transported NOx and ozone from the United States.

Ontario and the states subject to the NOx SIP Call share a common airshed. The airshed observes no state or international boundaries. The United States contributes 91 percent of the NOx emissions to our common airshed, while Canadian sources contribute only 9 percent. J.A. 2615.

A significant portion of ground-level ozone in Ontario originates from emissions from the United States. The Ozone Transport Assessment Group ("OTAG"), which was composed of the 37 easternmost states, and industry and environmental stakeholders, modeled the transport of air pollution in North

America. OTAG's modeling shows that weather and wind patterns in the ozone season result in NOx emissions and ozone formed in the United States being transported to Ontario. J.A. 2620. In fact, 50 percent or more of Ontario's ozone problem originates in the United States. J.A. 3563.

The only locations in Ontario at which ground-level ozone consistently exceeds the 120 parts per billion level (ppb) (which is the United States one-hour ozone national ambient air quality standard ("NAAQS")), are sites in the southern part of the Province along the Great Lakes.[1/] J.A. 2621. These high ozone levels are caused by transport of ozone and its precursors from the United States across Lake Erie and Lake Huron. *Ibid.* Morever, modeling conducted by the State of Michigan shows that the Toronto/London corridor in Ontario receives significant contributions of ozone and ozone precursors from southeastern Michigan. J.A. 2672.

Ozone problems in Ontario cannot be solved without major reductions in NOx emissions from the United States. Studies by Ontario scientists have shown that NOx and volatile organic compound emissions originating in the United States can, by themselves, cause Ontario's ambient air quality criterion for ozone to be exceeded. Brief of Intervenor Respondent Her Majesty the Queen in Right of Ontario (Province of Ontario, Canada), August 27, 1999, D.C. Cir., Nos. 98-1497, *et al.*, Attachment 1, p. 5. Thus, even if all of Ontario's industries and utilities were not operating and no automobiles were being driven in Ontario, ground level ozone problems in Ontario would still exist because of transboundary pollution from the United States.

[1/] We note that Ontario's own ground-level ozone standard is more stringent at 80 ppb. J.A. 2672.

2. GROUND-LEVEL OZONE HARMS HUMAN HEALTH AND THE ENVIRONMENT IN ONTARIO

NOx emissions harm human health and cause environmental damage. NOx emissions and volatile organic compounds react in the presence of sunlight to form ground-level ozone. 63 Fed. Reg. at 57,359. There does not appear to be a "threshold level" for ground-level ozone below which no health effects are observed. J.A. 3566.

The Ontario Medical Association summarized recent research findings concerning the health effects of ground-level ozone as follows (J.A. 3565):

> In a review of available evidence for the Canadian Smog Advisory Program, two expert panels concluded that health and health-care system effects of ground-level ozone at levels that occur in Canada include lung inflammation, decreased lung function, airway hyper-reactivity, respiratory symptoms, possible increased medication use and physician/emergency room visits among individuals with heart or lung disease, reduced exercise capacity, increased hospital admissions and possible increased mortality. [footnote omitted]

Elevated levels of ground-level ozone, which occur on hot, humid days, are a major ingredient of smog. Ozone in smog has been shown to cause airway inflammation in both healthy individuals, and those who suffer from respiratory ailments such as asthma. J.A. 3553, 3568. Studies have shown that even healthy outdoor workers have a measurable decrease

in lung function when exposed to low levels of ozone. J.A. 3566. In those who suffer from asthma, elevated ozone levels cause increased frequency of asthma attacks, emergency room visits, and hospital admissions. J.A. 3568. A study in Toronto, Ontario, showed that increased ozone levels were associated with increased mortality due to respiratory disease in those who suffer from cardio-respiratory illness. J.A. 3569.

Two independent studies in Ontario show that there is a correlation between elevated ozone levels and hospital admissions for acute respiratory disease. J.A. 3574. Asthma hospital admissions for children on the day after Ontario's ozone levels had exceeded the 80 ppb standard were consistently higher than such admissions on other summer days. *Ibid.*

Children are particularly at risk from ground-level ozone and are, in fact, the largest group sensitive to ozone air pollution. Children tend to be active outdoors in the summer when ground-level ozone levels are highest. J.A. 3570. The breathing pattern of children is different from that of adults, causing them to inhale and retain greater quantities per unit body weight than adults. *Ibid.* Studies, including those conducted in Ontario, show a measurable decrease in lung function of healthy children exposed to ozone. J.A. 3570-3571. "Ozone makes asthmatics more responsive to an allergen." J.A. 3571. Further, a six-year study in Ontario found that 15 percent of summer respiratory hospital admissions for infants were pollutant-associated. J.A. 3574.

Ground-level ozone also damages the environment. EPA has found that ground-level ozone causes "significant agricultural crop yield losses" and visible damage to the foliage of many crops, trees, and ornamental plants. 63 Fed. Reg. at

57,359. Current ambient ground-level ozone levels are causing harm to forests and ecosystems. *Ibid.*

3. ONTARIO HAS MADE SUBSTANTIAL EFFORTS TO CONTROL ITS OWN NOx EMISSIONS

Ontario's air quality standard for ozone is 80 ppb (one-hour average) (J.A. 2672), which is more stringent than the United States' one-hour ozone standard of 120 ppb. In a June 2000 agreement among the federal, provincial, and territorial governments of Canada, Ontario agreed to a Canada-Wide Standard of 65 ppb (eight-hour average) air quality standard for ozone to be achieved by 2010.[2/]

Ontario's emissions of NOx for 1998, the most recent year for which data are available, were less than 1990 levels by 17.4 percent.[3/]

Ontario has also set a goal to reduce projected emissions of NOx by 25 percent from 1990 levels by 2005.[4/] As just stated, by 1998, Ontario had already achieved a 17.4 percent reduction in NOx emissions from 1990 levels. By comparison, Ontario scientists expect the NOx SIP Call Rule to reduce NOx emissions in the covered states by approximately 25 percent on average from 1990 levels by 2007. See 63 Fed. Reg. at 57,450.[5/] Ontario has further pledged to achieve a 45 percent reduction in NOx emissions from 1990 levels by 2015.

[2/] See http://www.ec.gc.ca/special/aqa_2000_e.pdf.

[3/] See http://www.ene.gov.on.ca/envision/news/factnoxvoc.htm.

[4/] See http://www.ene.gov.on.ca/envision/news/00600MB.html.

[5/] See http://www.ec.gc.ca/special/aqa_2000_e.pdf.

Under the NOx SIP Call Rule, the states are free to choose their own methods of meeting the requirements of the Rule. See 63 Fed. Reg. at 57,358-57,359. Ontario understands that most NOx emissions reductions in the midwestern states will come from the electrical generating sector.[6/] The average rate of NOx emissions per megawatt hour ("MWH") of electricity produced in 1996 was 2.6 pounds for the northeastern states and 6.6 pounds for the midwestern states. J.A. 2650. Since the record closed below, NOx emissions data for 1998 have become available. The 1998 data show that Ontario's electricity sector emits less than one (1) pound of NOx per megawatt hour of electricity produced.[7/] In 1998, Ontario emitted less NOx per megawatt hour of electricity produced than the States of Michigan (3.85 lbs./MWH), Ohio (4.71 lbs./MWH), Indiana (5.46 lbs./MWH), Illinois (3.43 lbs./MWH), and even New York (1.67 lbs./MWH). In 1998, Ontario emitted less than a pound (0.96 lbs.) of NOx per megawatt hour of electricity produced. *Ibid.*

Ontario's total NOx emissions from electrical generation in 1998 were also significantly less than emissions from the electricity sector in each of the five states just mentioned. In comparison to Ohio, Ontario's NOx emissions are less by a factor of 5.7; in comparison to Michigan, Ontario's emissions are less by a factor of 3.2; in comparison to Indiana, Ontario's emissions are less by a factor of 5.2; in comparison to Illinois, Ontario's emissions are less by a factor

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[6/]We note that petitioners Appalachian Power Company, *et al.*, are comprised almost exclusively of electrical power companies. See Petition for a Writ of Certiorari, October Term 2000, No. 00-445, "Disclosure Statement," pp. x-xiii.

[7/]See data summarized at http://www.ene.gov.on.ca.envision/news/3charts2.pdf. The website reports emissions in kilograms. One kilogram is approximately 2.2 pounds.

of 3.9; and in comparison to New York, Ontario's emissions are less by a factor of 1.4. *Ibid.*

Thus, the most recent data available show that Ontario's NOx emissions are less than emissions from each of the five states discussed above per megawatt hour of electricity produced and less than the identified states on an absolute basis. Nonetheless, Ontario has also committed to adopt the EPA standards for fossil-fueled electricity generating plants when they are implemented, if their adoption will result in lower emissions in Ontario.[8/]

Since 50 percent of Ontario's ozone originates in the United States, controls on NOx emissions from the midwestern states are critical in order for Ontario to improve its air quality with respect to smog. Thus, Ontario strongly supports EPA's NOx SIP Call Rule, which will result in reduced NOx emissions being transported as NOx and ozone to Ontario, as part of an overall program to reduce ground-level ozone and smog in Ontario.

The control of air pollution emissions in an airshed which extends beyond state and international boundaries poses extremely complex regulatory issues. Ontario had observer status with OTAG, and scientists with Ontario's Ministry of the Environment have analyzed the technical basis of EPA's NOx SIP Call Rule, which was based closely on the work of OTAG. Ontario's scientists have concluded that the Rule is the result of comprehensive scientific analysis of an extremely complex air pollution problem and that it reflects sound policy choices. Ontario submits that the NOx SIP Call Rule will lead to cleaner air in both the United States and Ontario, Canada, and should be allowed to take effect.

[8/] See http://www.ene.gov.on.ca/envision/news/01400mb.html.

REASONS FOR DENYING THE WRIT

THE PETITIONS SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS DECISION

Section 109 of the Clean Air Act requires the Administrator of the Environmental Protection Agency ("EPA") to set National Ambient Air Quality Standards ("NAAQS") for air pollutants in order to protect human health and welfare. 42 U.S.C. 7409. Section 110(a) of the Act provides that, after EPA promulgates these NAAQS, each state is required to prepare a State Implementation Plan ("SIP") which implements the NAAQS. 42 U.S.C. 7410(a). The SIP is reviewed by EPA under Section 110. 42 U.S.C. 7410. Section 110(a)(2) of the Act sets forth criteria that a SIP must satisfy and provides that, if these criteria are met, EPA must approve the proposed plan. 42 U.S.C. 7410(a)(2).

Section 110(k)(5) of the Act provides that, once EPA determines that the "implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport * * * or to otherwise comply with any requirement of this chapter * * *," EPA must issue a rule ("SIP Call") that orders the state to revise and correct its SIP as necessary. 42 U.S.C. 7410(k)(5). Section 307(d) of the Act requires EPA, in issuing a SIP Call under Section 110(k)(5) of the Act, to adhere to its rulemaking procedures, including a formal notice and comment procedure. Section 307(d), 42 U.S.C. 7607(d).

a. The Decision Below Does Not Conflict with This Court's Decision in *Union Electric v. EPA*

In *Union Electric v. EPA*, 427 U.S. 246, 256 (1976), in considering the requirements for SIP's under Section 110(a)(2) of the Clean Air Act, this Court held:

> After surveying the relevant provisions of the Clean Air Amendments of 1970 and their legislative history, we agree that Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a state implementation plan.

The court of appeals concluded in this case that "[i]n sum, there is nothing in the text, structure, or history of Section 110(a)(2)(D) that bars EPA from considering cost in its application." 213 F.3d at 679. Petitioners Michigan, Alabama, West Virginia, South Carolina, and Virginia (hereafter "Michigan") argue that the decision below conflicts with *Union Electric* because, "in the absence of congressional intent, economic and technological infeasibility shall not be considered by the EPA under section 110(a)(2)." Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-632 (hereafter "Mich. Pet."), p. 14.[2/]

[2/]Michigan is the only petitioner who argues that EPA should be precluded from using cost in Section 110(a)(2). *See* Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-633 of the States of Ohio and Indiana (hereafter "Ohio Pet."), p. 15 ("we argue that considerations of cost-effectiveness should be a secondary factor to * * * air-quality factors under Section 110"); Petition for a Writ of Certiorari, Oct. Term 2000, No. 00-445 of the Appalachian Power Company, *et al.*, p. 12 ("Industry Petitioners do not question that cost is to play a key role in the implementation of the CAA in general and the implementation of the interstate pollutant transport

There is no conflict between *Union Electric* and the decision below.[10/] Michigan incorrectly concludes that "if the EPA was barred from reading cost considerations into the original section 110(a)(2)(E) when approving SIP's, it also must be barred from injecting cost considerations into today's section 110(a)(2)(D)." Mich. Pet. 16. Michigan attempts to extend broadly the *Union Electric* holding to cover any EPA action that relates to Section 110(a)(2) in an attempt to establish a conflict. Michigan's attempt to extend the Court's holding is unpersuasive because both the function that EPA is performing and the issues that are involved in this case are completely different from those in *Union Electric*.

In *Union Electric*, this Court was called upon to examine EPA's approval of a SIP under Section 110(a)(2) of the Act. The Court examined Section 110(a)(2) to decide "whether the operator of a regulated emission source, in a petition for review of an EPA-approved state plan filed after the original 30-day appeal period, can raise the claim that it is economically or technologically infeasible to comply with the plan." 427 U.S. at 249. The Court concluded, based on the "relevant provisions of the Clean Air Act amendments of 1970 and their legislative history," that EPA could not consider claims of economic or technological infeasibility when it reviewed a plan. 427 U.S. at 256. Thus, *Union Electric* addressed only whether a state's SIP met the criteria of Section 110(a)(2).

The present case involves EPA rulemaking under Section 110(k)(5) of the Act, rather than EPA's consideration of a SIP under Section 110(a)(2). Consistent with its

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provisions in particular").

[10/] Significantly, Michigan did not even rely on *Union Electric* in its opening or reply briefs in the court of appeals.

rulemaking authority, EPA first issued a notice of proposed rulemaking that found that emissions from 22 states and the District of Columbia "significantly contribute" to downwind air pollution problems. 62 Fed. Reg. 60,318 (Nov. 7, 1997). EPA required these states to revise their SIP's to "contain adequate provisions" to prevent the emission of pollutants that contribute significantly to the noncompliance of NAAQS's in other states. *Ibid.* The rule proposed that each state was required to eliminate the NOx emission that could be reduced by highly cost-effective measures. *Ibid.* After an extensive notice and comment period, including the issuance of revised and supplemental public notices, EPA issued the final rule on October 27, 1998. 63 Fed. Reg. at 57,356. As the court of appeals noted, "the fundamental dispute [in this case] is over the clarity of the phrase 'contribute significantly'" in Section 110(a)(2)(D) and how it was defined by EPA in its final rule. 213 F.3d at 679.

Michigan's challenge is not affected by the *Union Electric* holding that EPA cannot consider claims of economic and technological infeasibility when it reviews SIP's. The approval or rejection of SIP's involves an entirely different function and is performed under an entirely different statutory provision than the issuance of a SIP call, such as is involved in this case.

Morever, while EPA considered cost in promulgating the NOx SIP Call Rule, it did not consider any claim of "technological or economic infeasibility." To the contrary, the types of emission control relied upon by EPA in making its determinations in the rule-making were economically and technically feasible. In fact, EPA found them to be "highly cost-effective." 63 Fed. Reg. at 57, 377. Thus, the cost issues in the two cases are entirely different.

b. The Decision Below Does Not Conflict with Prior Decisions of the District of Columbia Circuit

Michigan further asserts that the decision of the Court of Appeals for the District of Columbia Circuit conflicts with its prior decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), and its recent decision in *American Trucking Ass'ns Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). Mich. Pet. 19. However, both of those cases involved Section 109 of the Act, not Section 110, which is the section at issue here. The Clean Air Act is a highly complex statute. The fact that in analyzing the statute, the court of appeals concluded that costs may not be considered in setting NAAQS under Section 109, but may be considered in implementing Section 110, creates no conflict among decisions of the Court of Appeals for the District of Columbia Circuit.

In *Lead Industries* and *American Trucking*, which were decided nearly 20 years apart, the court of appeals concluded, based on the plain language of the "statute and its legislative history[,] * * * [that] economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead Industries Ass'n v. EPA, supra,* 647 F.2d at 1148; *accord American Trucking Ass'ns Inc. v. EPA, supra,* 175 F.3d at 1040 ("As this court long ago made clear, in setting NAAQS under §109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards" (citing *Lead Industries* and other cases)).

Section 109(b)(1) of the Act, 42 U.S.C. 7409(b)(1), requires EPA to set national ambient air quality standards "which[,] in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite

to protect the public health." That statutory provision is not at issue in this case. Therefore, the court of appeals' conclusions that the statutory language of Section 109, along with its legislative history (*Lead Industries Ass'n v. EPA*, *supra*, 647 F.2d at 1149-1150), preclude EPA from considering costs in setting NAAQS, is irrelevant to the statutory interpretation of Section 110 of the Act, which is at issue here. Michigan can point to no statutory language or legislative history which would prohibit EPA from considering costs under Section 110(a)(2)(D)(i)(I) of the Act.

In attempting to show a conflict between the decision here and *Lead Industries*, Michigan asserts that, in *Lead Industries*, the court "reviewed Section 110" and stated that, "if Congress had wanted the economics of pollution control considered[,] it would have so provided in Section 110." Mich. Pet. 20, citing *Lead Industries*, 647 F.2d at 1149, n. 37. However, this statement in a footnote does not show any conflict between *Lead Industries* and the decision here.

First, the footnote is dictum. Section 110 of the Clean Air Act was not under consideration by the Court in *Lead Industries*.

Second, even if the footnote were not dictum, taken in context, it does not conflict with the decision below. In relevant part, the footnote states (647 F.2d at 1149, n. 37):

> Similarly, § 110, 42 U.S.C. 7410, provides that once ambient air quality standards have been promulgated, each state must prepare and submit an implementation plan outlining the measures to be taken to ensure that the standards are met. It is these state

> implementation plans which actually impose pollution control requirements and, consequently, if Congress had wanted the economics of pollution control considered it would have so provided in § 110. While states may consider economic and technological feasibility in selecting the mix of control devices, they may do so only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards. Section 110(a)(2), 42 U.S.C. 7410(a)(2). [emphasis added]

Michigan's citation of the footnote from *Lead Industries* omits the last sentence, which is emphasized above. This sentence is obviously critical. The court of appeals explicitly stated that under Section 110, "states may consider economic and technological feasibility in selecting the mix of control devices * * * only insofar as this does not interfere with meeting the strict deadlines for attainment of the standards." 647 F.2d at 1149, n. 37.

In this case, the strict deadlines for attainment of the NAAQS requirement for ozone have not been met. 63 Fed. Reg. at 57,446-57,447 (1998). EPA issued the NOx SIP Call Rule because the states had failed in their existing SIP's to control adequately NOx emissions which prevent attainment of the ozone NAAQS in downwind states. Thus, the very purpose of the NOx SIP Call Rule is to ensure compliance with the ozone NAAQS. Here, EPA's use of cost considerations was not in setting ambient air quality standards, but in determining how the standards will be implemented.

There is nothing in *Lead Industries* to support Michigan's view that, after EPA has identified the states whose NOx emissions are harming other states, EPA may not use cost considerations in setting the level of controls to be applied. EPA has concluded that applying the level of controls called for in the NOx SIP Call Rule will have an "appreciable impact" on downwind nonattainment, and that the required reductions in NOx emissions are not "more than is necessary to ameliorate downwind nonattainment." 63 Fed. Reg. 57, 403, 57,446-57,447 (1998). EPA's actions under Section 110 in this case are therefore consistent with the dictum in *Lead Industries*.

Michigan makes no claim that the *American Trucking* case even discusses Section 110 of the Clean Air Act. Mich. Pet. 19-21. Instead, Michigan alleges that a conflict exists because the court of appeals held that EPA may not consider costs in setting standards to protect public health and welfare under Section 109(d) of the Act in *American Trucking*, but that it may consider costs in the context of Section 110 in this case. Mich. Pet. 19-20. However, as we have seen, in *Lead Industries*, *supra,* 647 F.2d at 1149-1150, which has been consistently followed in the District of Columbia Circuit, the court of appeals based its conclusion that costs may not be considered in setting NAAQS under Section 109 on the statute's plain language and legislative history. Michigan makes no showing that Section 110's plain language and legislative history compel the same result. Therefore, no conflict exists between this case under Section 110 and *Lead Industries* and *American Trucking* under Section 109.

In any event, a conflict of decisions within a Circuit, even if it existed, would be no basis for granting a writ of certiorari. Such conflicts can be corrected by rehearings *en banc* within the Circuit. Petitioners, in fact, asked for rehearing

en banc, but did not rely on the alleged intra-circuit conflict. There is certainly no reason for a writ of certiorari to be granted on this basis.

c. EPA's Rule Does Not Conflict with State Sovereignty or the Act's Statutory Framework of Cooperative Federalism as Interpreted by This Court in *Train v. NRDC*

The Michigan and Ohio petitioners also argue broadly that EPA intruded on state sovereignty and cooperative federalism when it issued the NOx budget program in its Final Rule. Mich. Pet. 22; Ohio Pet. 9.

Michigan and Ohio claim that state sovereignty and cooperative federalism are offended because the NOx SIP Call Rule may cause a state, which contributes less to a particular area's ozone nonattainment than another state, to have to reduce more NOx emissions than the state which has contributed more. Michigan and Ohio use the example that Indiana contributes less than Pennsylvania to New York City's ozone nonattainment. Mich. Pet. 22-23; Ohio Pet. 12-13. Indiana, whose NOx emitters have not applied the same level of pollution control devices to their smokestacks as have Pennsylvania's emitters, will be able to achieve more highly cost-effective reductions in NOx emissions than Pennsylvania. Thus, under the budget set by EPA in the Rule, Indiana will be required to reduce its NOx emissions more than Pennsylvania.

Michigan and Ohio argue that this effect on Indiana offends state sovereignty and the system of cooperative federalism set forth by Congress in the Clean Air Act. Since Pennsylvania contributes more to New York City's nonattainment than does Indiana, Michigan and Ohio argue that

Pennsylvania should be required to reduce its emissions more. Mich. Pet. 24-25; Ohio Pet. 12-13. Michigan bases its argument on Section 110(k)(5) of the Act, 42 U.S.C. 7410(k)(5), which requires that once EPA has concluded that a SIP is inadequate, "the Administrator shall require the State as necessary to correct such inadequacies." Mich. Pet. 24. Michigan asserts that EPA's regulatory choices are "illogical" because, under the budgets set in the NOx SIP Call Rule with respect to New York City, Indiana will be controlling more NOx than is "necessary" and Pennsylvania will be controlling less NOx than is "necessary." *Ibid.*

Although Michigan and Ohio cast their argument as one of state sovereignty and cooperative federalism, it is really an argument concerning the wisdom of EPA's regulatory approach. In addressing the complicated problem of interstate ozone transport, where each state's NOx emissions have effects on the attainment of ozone air quality standards in numerous other states, it was appropriate for EPA to make the determination of the amount of NOx emissions from a state which "contribute significantly" and are necessary to be reduced to correct the inadequacy of the state's SIP. Under *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 845 (1984), the courts may not substitute their judgment for that of the agency, but must determine "whether the Administrator's view that [the regulatory choice] is appropriate in the context of this particular program is a reasonable one." The court of appeals properly concluded here that it had "no basis to upset EPA's judgment." 213 F.3d at 680.

The well-established law concerning the federal-state division of responsibilities under the Clean Air Act shows that EPA has acted fully within that authority in issuing the NOx SIP Call Rule. In *Train v. NRDC*, 421 U.S. 60, 79 (1975), this

Court recognized that EPA is "plainly charged by the Act with responsibility for setting the national ambient air standards," but was "relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations." The Court further stated that "so long as the ultimate effect of a State's choice of limitation is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Ibid.* This is exactly what EPA has allowed states to do in the NOx SIP Call Rule.

EPA made clear that a state could use any emissions control measure it wanted to achieve the NOx budget requirement. *See* Final Rule, 63 Fed. Reg. at 57,368. Under the budget plan, a state "may choose from a broader menu of cost-effective, reasonable alternatives" including alternatives that "may even be more advantageous in light of local concerns." *Id.*, pp. 57,369-57,370. Furthermore, EPA stated that the states have "full discretion in selecting the controls, so that [the states] may choose any set of controls that would assure achievement of the budget." *Id.*, p. 57, 378. Finally, each state has the option to adopt an interstate trading program that allows it to purchase NOx "allowances" from sources that have elected to over-control, as well as the option, under certain circumstances, of "banking" allowances from prior years so that it can meet emissions limits. *Id.*, p. 57,430. Thus, EPA allowed the states substantial discretion in carrying out their responsibilities under the Act.

Michigan argues in conclusion that certiorari should be granted because, in its view, there are other ways to improve public heath and the nation's air quality than those to be implemented under the NOx SIP Call Rule. Mich. Pet. 28.

Michigan is making a policy argument. This Court has made clear that such arguments must be addressed to Congress or to the agency, and not to the courts (*Chevron v. NRDC*, *supra*, 467 U.S. at 865):

> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. [footnotes omitted]

This is exactly the situation presented here and concerns the same statute the Court considered in *Chevron v. NRDC*, *supra*. The petitioners have presented no grounds for a grant of certiorari.

* * *

Ontario and the majority of the states subject to the NOx SIP Call Rule share a common airshed. Because of geography, chemistry, and weather, Ontario is directly affected by NOx emissions and ozone transported from the subject states. While no government can change geography, chemistry or weather, governments can work together to reduce emissions of NOx into our common airshed and protect health and the environment. The NOx SIP Call Rule is an important step for such purposes. The Rule reflects sound and sensible policy choices designed to ameliorate a complex air pollution problem. Ontario strongly supports the Rule before this Court.

CONCLUSION

For these reasons, and for those set forth by the other respondents, Ontario respectfully submits that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPALACHIAN POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

STATES OF OHIO AND INDIANA, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency, in promulgating a final rule respecting implementation of a National Ambient Air Quality Standard under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, reasonably determined that it may consider the cost-effectiveness of available pollution controls as a factor in identifying "upwind" State air pollution emissions that "contribute significantly" to nonattainment of the standard in "downwind" States.

2. Whether the court of appeals properly determined that the Environmental Protection Agency's authority under the relevant provisions of the Clean Air Act is sufficiently defined to satisfy the nondelegation doctrine.

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In the Supreme Court of the United States

No. 00-445

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

No. 00-632

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

No. 00-633

STATES OF OHIO AND INDIANA, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a)[1] is reported at 213 F.3d 663.

[1] This brief responds to three petitions for certiorari filed in this case: (1) *Appalachian Power Co.* v. *EPA*, No. 00-445 (filed Sept. 20, 2000) (APC Pet.); *Michigan* v. *EPA*, No. 00-632 (filed Oct.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. Petitions for rehearing were denied on June 22, 2000 (Pet. App. 62a-65a). The petition in No. 00-445 was filed on September 20, 2000. The Chief Justice extended the time for the States to file their petitions for a writ of certiorari to and including October 20, 2000, and the petitions in Nos. 00-632 and 00-633 were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision of the court of appeals arising from an Environmental Protection Agency (EPA) rulemaking under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* The CAA, among other things, directs EPA to develop National Ambient Air Quality Standards (NAAQS) and encourages States to implement the NAAQS through State Implementation Plans (SIPs). 42 U.S.C. 7410. EPA promulgated a rule, known as the "NOx SIP Call," that required the SIPs of 22 States and the District of Columbia to be revised to mitigate the interstate transportation of ozone. See 63 Fed. Reg. 57,356 (1998). Numerous petitioners challenged EPA's rule through consolidated petitions for review, and the court of appeals granted the petition in part, but largely rejected petitioners' objections to the rule. See Pet. App. 1a-61a.

1. The NOx SIP Call requires certain States (in order for their SIPs to remain acceptable under the Act) to develop plans to reduce emissions of ozone

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20, 2000) (Michigan Pet.); and *Ohio & Indiana* v. *EPA*, No. 00-633 (filed Oct. 20, 2000) (Ohio Pet.). For convenience, all citations to "Pet. App." refer to APC's petition appendix.

precursor air pollutants that contribute significantly to nonattainment of the NAAQS for ozone in "downwind" States. See generally 63 Fed. Reg. at 57,356. Ground-level ozone, which causes adverse health effects, is created from the chemical reactions of precursor pollutants in sunlight. *Id.* at 57,359. For nearly two decades, scientists have accumulated evidence that the wind-borne movement of nitrogen oxides (NOx) and other ozone precursors, often over long distances, contributes to serious downwind ozone problems, most notably in many of the major eastern urban centers. *Ibid.* The NOx SIP Call represents the culmination of a multi-year effort by Congress, EPA, and the States to develop solutions to that chronic interstate ozone pollution problem. See Pet. App. 8a-12a.

2. The CAA makes "the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). EPA is authorized to set NAAQS for air pollutants at levels requisite to protect public health and welfare. 42 U.S.C. 7409. EPA has established NAAQS for several pollutants, including ozone. 40 C.F.R. 50.9, 50.10. Once EPA promulgates a NAAQS, each State's SIP must provide for its implementation, maintenance and enforcement. 42 U.S.C. 7410(a). If the Administrator of EPA finds that an approved SIP is "substantially inadequate" to attain or maintain the NAAQS, mitigate adequately "interstate pollutant transport," or otherwise comply with the CAA, she is authorized to "require the State to revise the plan as necessary to correct such inadequacies" (*i.e.*, issue a "SIP Call"). 42 U.S.C. 7410(k)(5). Section 110(a)(2)(D) of the CAA, 42 U.S.C. 7410(a)(2)(D), sometimes referred to as the "good neighbor" provision, requires that all SIPs, *inter alia*, prohibit emissions of air pollutants

in amounts that would "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any * * * [NAAQS]."

3. On November 7, 1997, EPA issued a notice of proposed rulemaking for the NOx SIP Call, finding that 22 States and the District of Columbia (for convenience, the "23 States") significantly contribute to nonattainment of the ozone standard in downwind areas within the meaning of the CAA's good neighbor provision. 62 Fed. Reg. 60,318, 60,320 (1997).[2] At the same time, EPA proposed to require each of the 23 States to revise its SIP to demonstrate that total emissions, within each State, of NOx—the most significant ozone precursor responsible for ozone transported to other States—would be reduced by the amounts determined to be significant and, therefore, would not exceed an assigned NOx emissions "budget" established by EPA. *Ibid.* EPA published the final rule on October 27, 1998. 63 Fed. Reg. at 57,356. Like the proposal, the final rule determined that the 23 States contribute significantly to downwind ozone nonattainment and required each of those States to submit SIP revisions containing control measures sufficient to meet the State's NOx budget. 40 C.F.R. 51.121(e)(1).

4. The final rule was premised, first and foremost, on state-of-the-art computer modeling of air quality, showing which upwind States were, in fact, substantial enough contributors to nonattainment of the "1-hour"

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[2] The 23 States were Alabama, Connecticut, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. 62 Fed. Reg. at 60,320.

ozone standard in downwind areas to warrant inclusion in the SIP Call.[3] For the proposal, EPA relied heavily on modeling performed between 1995 and 1997 by the Ozone Transport Assessment Group (OTAG), a workgroup with representatives from States, industry, environmental organizations, and EPA. See Pet. App. 12a-13a. In response to comments arguing that the OTAG modeling utilized for the proposal was not specific enough, EPA conducted additional, state-specific air-quality modeling using two different modeling techniques. *Id.* at 13a. From that modeling, EPA compiled detailed data summaries showing the magnitude, frequency, and relative amount of each upwind State's emissions contributions to each downwind nonattainment problem being studied. *Id.* at 16a. That additional air quality analysis, fully documented in the record for the final rule, confirmed EPA's proposed "significant contribution" finding as to the 23 States. *Id.* at 13a; 63 Fed. Reg. at 57,384. As the court of appeals correctly noted, in the course of the present litigation, "no one quarrel[ed] either with [EPA's] use of multiple measures, or with the way it drew the line at this stage." Pet. App. 16a.

5. EPA then examined the cost-effectiveness of available emissions controls in each of the 23 upwind

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[3] In the final rule, EPA also independently analyzed the need for the SIP Call under an "8-hour" ozone standard that EPA issued in 1997. See generally Pet. App. 6a-7a. However, in light of the ongoing challenge to the 8-hour ozone standard in *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027, reh'g granted in part and denied in part, 195 F.3d 4 (D.C. Cir. 1999), cert. granted, 120 S. Ct. 2003, 2193 (2000) (*ATA*), EPA stayed the findings for the SIP Call under the 8-hour standard, and the court of appeals accordingly limited its review to the support for the SIP Call under the 1-hour standard. Pet. App. 7a-8a.

States as part of its analysis in determining the amount of the State's emissions that were considered to "contribute significantly" to downwind nonattainment, as well as the corresponding emission reductions that were needed to eliminate the significant contribution. The remaining emissions became each of those States' "NOx budgets," *i.e.*, the maximum amount of NOx emissions expected after the States implement controls necessary to eliminate the "significantly contributing" emissions. Pet. App. 16a-17a. In effect, EPA set each State's NOx budget to reflect the amount of "highly cost-effective" NOx emissions reductions EPA believed would be available in that State. *Id.* at 17a; 63 Fed. Reg. at 57,377-57,378, 57,399-57,403. For purposes of that analysis, which included review of extensive emissions control data, EPA determined that "highly cost-effective" NOx emissions reductions are those that cost no more than $2,000 per ton of NOx reduced. Pet. App. 17a. EPA emphasized, however, that, in developing SIP revisions to meet the NOx budgets, States would be free to rely on any NOx emission control measures they deemed appropriate, whether or not they were the same controls assumed by EPA in developing the budgets. *Id.* at 42a; 63 Fed. Reg. at 57,369-57,370, 57,378.

EPA tested the efficacy of the proposed NOx emissions budgets through further rounds of air quality modeling. First, it conducted additional computer modeling to ensure that the budgets would produce appropriate downwind air quality improvements. See 63 Fed. Reg. at 57,379. That modeling confirmed that the required reductions would, in fact, allow downwind ozone nonattainment areas to make "appreciable progress towards attainment" and would not result in any instances of "overkill," *i.e.*, upwind emissions reductions

that "are more than necessary to ameliorate downwind nonattainment in every downwind area affected by that upwind State." *Ibid.* EPA also compared the air quality and cost impacts of its proposed approach to alternative approaches premised, for example, on "varying levels of controls in different parts of the 23 jurisdictions." *Id.* at 57,423. EPA concluded, however, that none of those alternatives would "provide either a significant improvement in air quality or a substantial reduction in cost." Pet. App. 26a (quoting 63 Fed. Reg. at 57,423). The court of appeals noted that petitioners "offer[ed] no material critique of EPA's methodology in reaching this answer." Pet. App. 26a.

6. Various States and industry groups challenged the NOx SIP Call through consolidated petitions for review in the court of appeals. Other States, industry groups, and environmental groups intervened in support of the rule. The petitions raised myriad issues, including the two issues that provide the basis for the petitions for writ of certiorari: (1) whether cost-effectiveness of emissions controls may be considered in determining what level of emissions contributions are "significant"; and (2) whether the CAA or EPA's interpretations of its provisions are so undefined as to violate the nondelegation doctrine. The court denied all of the petitions for review on those and other major issues. Pet. App. 1a-56a. It vacated, however, certain relatively minor aspects of the rule, which are not at issue here.[4] Judge Sentelle dissented. He concluded

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[4] On the basis of certain discrete record issues, the court of appeals vacated the SIP Call as it applied to Wisconsin, Missouri, and Georgia. The court also remanded the rule for EPA to reconsider issues respecting the definition of an electric generating unit and a change in the control level assumed for large stationary internal combustion engines. Pet. App. 56a.

that the relevant provisions of the CAA do not allow EPA to consider cost of controls at all, and he would have vacated the entire rule on that basis. *Id.* at 57a-61a. Petitioners sought rehearing and rehearing en banc, primarily on the grounds articulated in the dissent, but the court of appeals denied those petitions. *Id.* at 62a-65a. Judge Sentelle would have granted the petitions. *Ibid.*

ARGUMENT

The court of appeals correctly ruled that EPA may consider the cost-effectiveness of pollution controls in determining which emissions contribute significantly to nonattainment of the ozone standard in downwind areas. That statutory ruling is correct, does not conflict with any decision of this Court or any other court of appeals, and accordingly does not warrant review by this Court. The court of appeals also was correct in holding that neither the relevant provisions of the CAA nor EPA's actions violate the nondelegation doctrine. While the court of appeals' analysis was premised, in part, on a decision of that court that the federal government has challenged in *Browner* v. *American Trucking Associations* (*ATA*), No. 99-1257 (argued Nov. 7, 2000), the judgment reached by the court of appeals is correct and does not warrant further review, regardless of this Court's decision in *ATA*.[5]

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[5] APC and Ohio suggest that the Court may wish to defer action on their petitions pending a decision in *ATA*. APC Pet. i n.*; Ohio Pet. 16 n.8. That action is not warranted as to either the nondelegation issue or the cost issue in this case. The court of appeals adopted a novel nondelegation standard in *ATA*, *supra*, at 1027, and the federal government has challenged that ruling in *Browner* v. *ATA*, No. 99-1257. The court of appeals in this case, however, has rejected petitioners' nondelegation argument, even

1. The NOx SIP Call is EPA's effort to implement the CAA provisions that address an interstate problem —the accumulation of ozone, which, for example, blankets the northeastern United States on warm summer days as a result of air pollution emitted by numerous sources in nearly two dozen States east of the Mississippi River. EPA identified, through sophisticated air quality modeling, those States that contribute to that problem, and it then identified as "significant contributions" those emissions in excess of what the emission levels would be if all of the contributing States imposed the same level of highly cost-effective emission controls on their sources.

As we have explained in *ATA* v. *Browner*, No. 99-1426, the Clean Air Act prohibits consideration of the projected cost of pollution controls when establishing NAAQS, but generally allows those costs to be considered at the implementation stage. See Br. for Fed. Resp'ts at 5-7, 17-31, 45-47, *ATA* v. *Browner*, *supra*. In accordance with that overall statutory structure, EPA has reasonably construed the relevant provisions of the Act—Section 110(a)(2)(D) and

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under its *ATA* ruling. Pet. App. 26a-28a. The relevant provisions of the CAA would satisfy nondelegation requirements under any plausible standard. See pp. 20-22, *infra*. The cross-petitioners in *ATA* v. *Browner*, No. 99-1426, contend that the CAA requires EPA to consider the costs of pollution control when setting NAAQS. Petitioners in this case contend, however, that the CAA precludes EPA from considering those costs when determining how to implement the CAA's trans-boundary pollution provisions set out in Section 110(a)(2)(D), 42 U.S.C. 7410(a)(2)(D). If the cross-petitioners in *ATA* prevail on their cost issue, that result would weaken, rather than bolster, petitioners' cost argument in this case. And if the *ATA* cross-petitioners do not prevail on their cost issue, that result would preserve the state of the law that provided the basis for the court of appeals' decision in this case.

(k)(5)—to allow consideration of cost-effectiveness of controls in determining which contributions to the interstate ozone problem are "significant[]" for purposes of the NOx SIP Call. See 42 U.S.C. 7410(a)(2)(D) and (k)(5). The court of appeals properly upheld EPA's determination. Petitioners' challenges rely heavily on mistaken characterizations of the manner in which EPA considered costs in the rulemaking. Because the court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals, petitioners' challenge to EPA's construction of the relevant provisions of the CAA presents no issue warranting this Court's review.

a. The petitions for writ of certiorari rest largely on the mistaken assertion that the NOx SIP Call "rel[ies] on cost-effectiveness, to the exclusion of air quality effects, in assessing whether one state's emissions contribute 'significantly' to another state's ozone nonattainment air quality." APC Pet. 14; see also, *e.g.*, Michigan Pet. 12; Ohio Pet. 5-6. To the contrary, EPA focused on air quality—not cost—as the principal basis for determining which States have total emissions with sufficient impacts on downwind ozone nonattainment to warrant inclusion in the SIP Call. EPA's determinations were premised on state-specific, multi-dimensional, air-quality modeling analyses that were fully documented in the administrative record and mostly unchallenged in this case. See pp. 4-7, *supra*; Pet. App. 12a-14a, 16a; 63 Fed. Reg. at 57,384, 57,387-57,398.[6]

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[6] That modeling allowed EPA to make careful, air-quality-based distinctions among all upwind States whose emissions could potentially impact a particular downwind area. In many instances, EPA determined that the ambient impacts downwind from a particular upwind State's emissions were so small as to not be "significant" with regard to particular downwind nonattainment pro-

As the court of appeals correctly recognized, only after those determinations were made did EPA examine the amount of highly cost-effective NOx emissions reductions available to develop the NOx budgets. Pet. App. 16a-17a; see also 63 Fed. Reg. at 57,377-57,378. That analysis was the principal factor only in determining the *subset* of each relevant upwind State's total NOx emissions that should be eliminated as the "significant contribution" to downwind nonattainment. See Pet. App. 16a-17a. Furthermore, after EPA derived the proposed NOx budgets, EPA conducted *additional* air quality modeling, again fully documented in the record and mostly unchallenged in this case. The modeling showed that the required emissions reductions, as a whole, would have an "appreciable impact" on downwind nonattainment and that there is no instance where a required upwind emission reduction is "more than necessary to ameliorate downwind nonattainment." 63 Fed. Reg. at 57,403, 57,446-57,447.[7]

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blems. See, *e.g.*, 63 Fed. Reg. at 57,392-57,394 (comparing modeling data for upwind States that were, and were not, found to contribute "significantly" to New York City's nonattainment problem). The court of appeals pointed out that petitioners "really [did] nothing more than quibble" with EPA's modeling, and "no one quarrel[ed]" with the overall analytical approach used by EPA to interpret the data and determine significant contributions of upwind States. Pet. App. 13a, 16a. One South Carolina utility company did object to EPA's findings respecting air quality modeling for the State of South Carolina, but the court's specific rejection of the utility's arguments illustrates the soundness of the air quality modeling that EPA performed at that stage of its analysis. See *id.* at 36a-37a.

[7] EPA determined that, even after implementation of the SIP Call, some "residual nonattainment" would likely persist for at least one downwind area linked to each upwind State. See 63 Fed. Reg. at 57,404, 57,447. Thus, if anything, EPA erred on the side of

Accordingly, and contrary to petitioners' suggestions, the question presented in this case is *not* whether EPA may base a SIP Call exclusively (or primarily) on cost, rather than air quality, considerations. Rather, the question is whether EPA may use cost analyses to help develop a fair, practical, and effective regulatory approach supported—and bounded—by extensive and mostly undisputed air quality modeling. The court of appeals correctly answered that question.

b. The court of appeals ruled, on the basis of the CAA and its legislative history, that EPA reasonably construed Section 110(a)(2)(D). See Pet. App. 15a-25a. EPA concluded that, when determining the amount of each upwind State's emissions that "contribute significantly to nonattainment" in downwind States (42 U.S.C. 7410(a)(2)(D)), EPA could consider the level of emission reduction that could be achieved in the upwind States through cost-effective control measures. The CAA neither requires nor prohibits EPA's consideration of that sensible benchmark as part of the process for solving a complex, and highly fact intensive, interstate pollution problem. As the court of appeals properly recognized, EPA's approach represents a reasonable construction of its obligations under the relevant provisions of the CAA. See *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-844 (1984).[8]

In upholding EPA's construction of the statute, the court of appeals correctly observed that "[t]he term

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under-control rather than over-control. EPA stated that it would continue to monitor the progress made on ozone nonattainment and, if necessary, "may establish new budget levels and allocation mechanisms for the post-2007 timeframe." 63 Fed. Reg. at 57,428.

[8] The court of appeals correctly noted that no party argued (and the court did not hold) that EPA was *required* to consider costs under Section 110(a)(2)(D). Pet. App. 17a-18a, 22a.

'significant' does not in itself convey a thought that significance should be measured in only one dimension." Pet. App. 21a.[9] The court explained that EPA is justified in construing the term "significant" to allow for consideration of emission control costs when making regulatory decisions in the context presented here. See *id.* at 21a-25a. Furthermore, the CAA's legislative history indicates that, at least since 1977, Congress has anticipated the need to take account of pollution control costs and the economic incentives of the States that contribute to, or are affected by, interstate pollution.[10] EPA's approach fulfills Congress's objective to ameliorate the impact of interstate pollutant transport and to do so in a way that equitably distributes the burdens borne by all the States that are contributors to this complex, regional problem.

c. Petitioners are mistaken in suggesting that EPA's approach conflicts with other decisions of the courts of appeals. See APC Pet. 17-19; Michigan Pet. 11-12. They essentially argue, based on Judge Sentelle's dissent, that Congress clearly intended to

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[9] At least one of the petitioners appears to agree with this statement. See Ohio Pet. 10 ("It is true, as the court of appeals noted, that the term 'significant' is inherently open-ended and is susceptible of an interpretation that would consider costs of reduction as one of several factors in measuring 'contributions' that require a regulatory response.").

[10] See S. Rep. No. 95-127, 95th Cong., 1st Sess. 41-42 (1977) (noting the need to address the "serious inequities among several States, where one State may have more stringent [SIP] requirements than another State," and to "equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State"); see also *id.* at 42 (noting that "plants in States with more stringent control requirements" are subject to a "distinct economic and competitive disadvantage").

preclude consideration of costs under Section 110(a)(2)(D). See Pet. App. 59a-60a. The court of appeals correctly rejected petitioners' contention. Judge Sentelle relied on cases such as *American Petroleum Institute* v. *EPA*, 52 F.3d 1113 (D.C. Cir. 1995), and *Ethyl Corp.* v. *EPA*, 51 F.3d 1053 (D.C. Cir. 1995), which recognize that, where a statutory provision unambiguously confines an agency's authority to the satisfaction of a specified goal, or to the consideration of a specified factor, the agency is not at liberty to take regulatory action under that provision to effectuate other goals, or to base its decision on other factors.[11]

EPA did not violate that principle. EPA properly focused the NOx SIP Call on the precise air quality issue that is the subject of Section 110(a)(2)(D)—the elimination of emissions that "contribute significantly" to nonattainment of the NAAQS in downwind States. EPA merely considered emission control costs as part of its analysis. This case therefore does not pose the question whether EPA can take regulatory action premised on a goal or factor different from that set forth in the relevant statutory provision, nor whether EPA has taken action exceeding its statutory authority. See APC Pet. 16 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Rather, the question here is simply whether EPA may consider costs as part of an effort to give meaningful effect to an undefined term in the relevant provision—in this case, the phrase "contri-

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[11] See *American Petroleum Inst.*, 52 F.3d at 1119 (finding that the relevant statutory provisions unambiguously required that regulation be "directed toward the reduction of VOCs and toxics emissions"); *Ethyl Corp.*, 51 F.3d at 1058 (finding that the relevant statutory provisions unambiguously confined fuel additive waiver determination to effects of additive on emission control devices).

bute significantly to nonattainment." See Pet. App. 21a ("The fundamental dispute is over the clarity of the phrase 'contribute significantly.'"). As the court of appeals correctly recognized, that court's previous decisions support EPA's determination. See *id.* at 21a-24a.

The court of appeals appropriately focused on cases such as *NRDC* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc). See Pet. App. 23a-24a. In *NRDC*, the court considered challenges to EPA's use of emission control costs in setting an emission standard for vinyl chloride, which the CAA regulates as a "hazardous" air pollutant. See CAA § 112, 42 U.S.C. 7412 (1994 & Supp. IV 1998). Section 112 provided, at that time, that hazardous pollutant emission standards were to be set "at the level which in [the Administrator's] judgment provides an ample margin of safety to protect the public health." 824 F.2d at 1148. The court of appeals ruled that EPA may consider emission control costs in making that determination, explaining that "the phrase 'to protect the public health' evinces an intent to make health the primary consideration," but that nothing in the statute or its legislative history indicated any congressional intent to preclude consideration of costs. *Id.* at 1155.[12]

The court of appeals in this case noted that it has routinely applied its approach in *NRDC* to determine when an agency may consider costs when making regu-

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[12] The court of appeals ultimately remanded EPA's vinyl chloride rule because the court found that EPA had "*substituted* technological feasibility for health as the primary consideration." 824 F.2d at 1164 (emphasis added); see also APC Pet. 7 (discussing that aspect of the court's decision). That concern, however, is not present in this case. EPA's consideration of costs was only one component of its overall effort to implement Section 110(a)(2)(D)'s air quality goals.

latory decisions. See Pet. App. 22a-23a.[13] Petitioners have failed to identify, either here or in the proceedings below, any persuasive evidence that Congress intended to preclude EPA from considering costs under Section 110(a)(2)(D). See *id.* at 24a-25a.[14]

d. There is no merit to the contentions of Michigan and Ohio that EPA's regulatory approach represents an improper intrusion on state sovereignty. See Ohio Pet. 9-16; Michigan Pet. 14-19, 22-28. While the States' arguments are somewhat ambiguous, they seem to focus on Section 110(k)(5)'s direction that EPA shall call for revision of a State's SIP "as necessary to correct * * * inadequacies." Ohio Pet. 11; Michigan Pet. 24-25. In petitioners' view, EPA's analytical approach was so blunt that it required some States to reduce emissions

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[13] See, *e.g.*, *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 622-624 (1998) (although improvement in air quality is the "overall goal" of the CAA gasoline anti-dumping provisions, EPA permissibly considered economic factors since nothing "in the text or structure" of the statute precluded such consideration), amended on other grounds, 164 F.3d 676 (D.C. Cir. 1999); *Grand Canyon Air Tour Coalition* v. *FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998) (FAA properly considered economic impacts on air tour industry as factor in developing regulation under statute providing for "substantial restoration of natural quiet" in Grand Canyon National Park), cert. denied, 526 U.S. 1158 (1999).

[14] In the court of appeals proceedings, petitioners advanced conflicting theories of the extent to which Section 110(a)(2)(D) allows consideration of costs. See Pet. App. 17a-20a. That divergence continues here. Compare APC Pet. 16 (consideration of costs precluded), and Michigan Pet. 8 (same), with Ohio Pet. 15 (costs may be considered, but only as a "secondary consideration"). As the court of appeals aptly observed, "[a]gainst this backdrop, it would be at the very least ironic for us to say there is 'clear congressional intent to preclude consideration of cost' under 110(a)(2)(D)." Pet. App. 20a (quoting *NRDC* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc)).

more than "necessary," while other States are tasked with reducing emissions less than "necessary." Ohio Pet. 11-14; Michigan Pet. 25. Petitioners essentially contend that EPA erred by not tailoring state NOx budgets more precisely to the modeled impact of each State's emissions on downwind nonattainment areas.[15]

The court of appeals properly rejected the gist of that argument on the basis of the rulemaking record. See Pet. App. 25a-26a. The court observed that, before selecting a relatively uniform analytical approach to calculate each State's NOx budget, EPA also modeled approaches that introduced more regional variations, similar to the approaches that petitioners now suggest. *Ibid.* EPA found that the non-uniform approaches provided no significant advantages over the uniform approach, in terms of either air quality or cost, and that "[t]he complaining states offer[ed] no material critique of EPA's methodology in reaching this answer." *Id.* at 26a. The court correctly recognized that any regulatory approach to an exceedingly complex interstate air pollution problem could be attacked as having some imprecision, particularly when viewed from a parochial perspective. EPA considered various approaches and reasonably selected one that struck an appropriate balance among the relevant technical considerations.

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[15] While petitioners presented similar factual arguments to the court of appeals, they were not presented in federalism terms. The States' federalism arguments below rested on a more sweeping assertion that EPA's decision to establish NOx budgets, in and of itself, inappropriately restricted the States' prerogatives to choose emission control strategies. Pet. App. 37a-43a. The court of appeals rejected that argument, and the States do not directly challenge that aspect of the court decision here.

See *ibid.*; see also, *e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 376-377 (1989).[16]

e. There also is no merit to Michigan's argument that EPA's consideration of cost-effectiveness of emission controls in the NOx SIP Call conflicts with this Court's decision in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). See Michigan Pet. 14-19. Michigan contends that in *Union Electric*, the Court held that a SIP revision submitted under Section 110(a)(2), 42 U.S.C. 7410(a)(2), may be evaluated only on the basis of whether it meets the minimum conditions identified in subparagraphs (A) to (H) of that provision and that none of those minimum conditions includes consideration of economic or technological feasibility. See Michigan Pet. 15 (citing *Union Elec.*, 427 U.S. at 257).

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[16] The complexity of developing a more "variable" type of approach is apparent from the record. Each of the States subject to the SIP Call was found to contribute "significantly" to 1-hour ozone nonattainment in numerous (in some cases, as many as a dozen or more) downwind States, and many "upwind" States are themselves "downwind" receivers of pollution contributions from other States. See 63 Fed. Reg. at 57,394-57,395. Overall, EPA found that there were more than 150 significant upwind-to-downwind state pollution contribution linkages under the 1-hour ozone standard. See *ibid.* (Table II-5). Furthermore, the magnitude, frequency, and relative amount of the air pollution contributions underlying each of those linkages varies considerably. See, *e.g.*, *id.* at 57,396-57,398 (examples of modeling data for linkages). Petitioners do not identify any alternative approach from the administrative record that would adequately address all the complex dimensions of this regional problem. Instead, petitioners suggest that EPA's approach is imprecise based on selective comparisons that fail to grapple with the larger and more complex problems that EPA needed to address. See, *e.g.*, Ohio Pet. 12-13 (comparing Indiana/New York and Pennsylvania/New York linkages); Michigan Pet. 22-23 (same).

Michigan's understanding of *Union Electric* is incorrect.

The Court's *Union Electric* decision addressed a sulfur dioxide SIP submitted under the requirement of Section 110(a)(2)(A)(i), which provided, at that time, that each State must formulate a SIP to achieve the primary NAAQS "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan." 427 U.S. at 249-251. The Court stated in broad terms that "Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a [SIP]." *Id.* at 256. But the Court also made clear that its holding concerning economic and technological feasibility was focused on the type of SIP revision at issue. *Id.* at 265 ("In sum, we have concluded that claims of economic or technological infeasibility may not be considered by the Administrator *in evaluating a state requirement that primary ambient air quality standards be met in the mandatory three years.*") (emphasis added). *Union Electric* expressly recognized that consideration of "[e]conomic and technological factors" may be appropriate in circumstances other than those directly at issue in that case. *Id.* at 264-265 n.13. Michigan is accordingly mistaken in suggesting that *Union Electric* precludes EPA from considering economic and technological factors when taking actions under Section 110(a)(2)(D).[17]

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[17] Michigan's reliance on *Train* v. *NRDC*, 421 U.S. 60, 79 (1975), is similarly misplaced. See Michigan Pet. 25. The *Train* decision—which held that certain amendments to SIPs should be treated as "revisions" and not as "postponement[s]" and, therefore, should be subject to more relaxed statutory requirements under the version of the CAA then in effect, 421 U.S. at 98-99—has no direct bearing on the issues presented here.

2. APC alone objects to the court of appeals' decision on nondelegation grounds. See APC Pet. 19-21. As APC recognizes, the court of appeals recently relied on the nondelegation doctrine to invalidate EPA's promulgation of revised ozone and particulate matter NAAQS. See *ATA*, *supra*. This Court has granted the federal government's petition for a writ of certiorari challenging the court of appeals' *ATA* decision. See *Browner* v. *ATA*, No. 00-1297. Regardless of the outcome of that case, the court of appeals was correct in ruling that Section 110(a)(2)(D) does not violate the nondelegation doctrine.

The court of appeals concluded that its *ATA* ruling, which requires agencies to identify an "intelligible principle" when exercising discretion under broad statutory grants, applies only to agency action that has nationwide effect. See Pet. App. 26a-27a. The court rejected petitioners' nondelegation challenge primarily on the ground that EPA's interpretation of Section 110(a)(2)(D) has "confined the statute to a modest role." *Id.* at 28a. The Court need not rely on that particular distinction, however, because Section 110(a)(2)(D) is constitutional under any reasonable view of the nondelegation doctrine. This Court's decisions recognize that the nondelegation doctrine is satisfied if a statutory grant of authority itself sets forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." See *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (citation omitted). Section 110(a)(2)(D) plainly satisfies that standard. It quite specifically directs EPA to ensure that each SIP contains adequate provisions to prevent emission of air pollutants in amounts that, inter alia, "contribute significantly to nonattainment in, or inter-

fere with maintenance by, any other State with respect to any [NAAQS]." 42 U.S.C. 7410(a)(2)(D). Section 110(a)(2)(D) simply confers the normal quantum of discretion that agencies routinely exercise in administering statutory programs. See, *e.g.*, *Chevron U.S.A.*, 467 U.S. at 843-845.

APC's further suggestion that the Court should alternatively find "EPA's selection of its $2000-per-ton cut-off point" to be "arbitrary and capricious" is also without merit. APC Pet. 20-21. APC did not make that argument in the court of appeals and has not even identified it as a question presented in its petition for a writ of certiorari. See APC Pet. i. APC's argument rests on an out-of-context partial quotation from the court of appeals' nondelegation ruling. The court stated that the $2000-per-ton threshold, viewed from the perspective of *ATA*'s *nondelegation* ruling, is a "radically incomplete line-drawing device." Pet. App. 26a; APC Pet. 20. The court nevertheless expressly acknowledged the extensive *factual* support for the $2000-per-ton threshold in the administrative record. Pet. App. 27a.[18]

Whatever the merits of the court of appeals' nondelegation ruling in *ATA*, that decision does not alter the established standard for determining whether an agency's action is arbitrary or capricious. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971) (a court is limited to examining

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[18] See Pet. App. 27a ("EPA indicates that it rested the $2000/ton figure on 'NOx emissions controls that are available and of comparable cost to other recently undertaken or planned NOx measures'") (quoting 63 Fed. Reg. at 57,400). EPA's determination was based on extensive analysis of emission control data that was fully documented in the rulemaking record. See 63 Fed. Reg. at 57,377-57,378, 57,399-57,403.

whether the agency's action "was based on a consideration of the relevant factors and whether there has been a clear error of judgment"). EPA amply justified its choice of the $2000-per-ton threshold in the rulemaking proceeding. 63 Fed. Reg. at 57,377-57,378, 57,399-57,403. Hence, even if APC had raised a challenge to EPA's selection of that threshold under the arbitrary or capricious standard in the court of appeals, the challenge would have failed. There is no reason for this Court to address, for the first time in this case, that entirely factbound question.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners hereby amend the corporate disclosure statement filed with this petition for a writ of certiorari. (Case No. 00-445). For convenience, provided below are the page numbers of the petition for a writ of certiorari listing petitioners as to which an amended statement is provided.

Carolina Power & Light (p. x)
(parent: Progress Energy, Inc.)
(State Street Bank & Trust Company Boston is no longer a 10% or greater owner)

Central and South West Services, Inc. (p. x) (now merged with American Electric Power Co., Inc.)

Central Illinois Public Service Company (p. x) (now known as AmerenCIPS)

Central Power and Light Company (p. x)
(parent: American Electric Power Co., Inc.)

Florida Power Corp. (p. x)
(parent: Florida Progress Corporation, which is a subsidiary of Progress Energy, Inc.)

Illinois Power Company (p. xi) (now known as Dynegy Marketing and Trade)

Otter Tail Power Co. (p. xi)
(Otter Tail Power Co. ESOP is no longer a 10% or greater owner)

PacifiCorp Electric Operations (p. xi) (now known as PacifiCorp)
(parent: Scottish Power plc)

Public Service Company of Oklahoma (p. xii)
(parent: American Electric Power Company, Inc.)

Southwestern Electric Power Company (p. xii)
(parent: American Electric Power Company, Inc.)

Union Electric Co. (p. xii) (now known as AmerenUE)

West Texas Utilities Co. (p. xii)
(parent: American Electric Power Company, Inc.)

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ARGUMENT

In its response, EPA argues that Petitioners are mistaken in asserting that EPA relied on cost to the exclusion of air quality considerations in making its findings of "significant contribution" under § 110(a)(2)(D)(i) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i). EPA Br. 10. Based on this argument, EPA now asserts that the issue is not whether a § 110(a)(2)(D)(i) significant contribution finding can be based exclusively (or primarily) on cost rather than air quality effects, but whether EPA may use cost analyses to develop the regulatory remedy in response to supposedly air-quality-based significant contribution findings. *Id.* at 12.

EPA's post-hoc attempt to re-frame the issue must fail. EPA did not make significant contribution findings based on air quality considerations. The record makes clear that (1) EPA considered air quality effects in deciding whether one state's emissions make *any* contribution to nonattainment air quality in another state, but (2) once EPA found any contribution, EPA determined whether that contribution was *significant* based solely on the cost of emission controls. This approach ignores the Clean Air Act's decisional criterion – *i.e.*, air quality effects – for assessing whether a contribution to nonattainment is significant, and therefore conflicts with cases in this Court and in the D.C. Circuit establishing that, where a statutory provision confines an agency's authority to consideration of a specific criterion, the agency is not at liberty to base regulatory actions on other criteria that it prefers to use.

With regard to the conflict between the decision below and the constitutional non-delegation doctrine, EPA does not even attempt to rely on or support the court of appeals' reasoning – *i.e.*, that, despite the lack of an intelligible

principle guiding EPA's action, the non-delegation doctrine is not applicable where that action affects less than "all American enterprise" or no more than "half of the nation." Pet. App. 28a. Instead, EPA contends that the statute provides an intelligible principle and that EPA acted consistent with that principle. EPA Br. 20. But the issue presented here is not whether some rationale rejected by the court might sustain EPA's action; the issue is whether the court's decision is consistent with the fundamental principle that lawful agency actions must always be bounded by an intelligible principle in statutory law. Because the court's basis for finding the non-delegation doctrine inapplicable cannot be reconciled with that principle, this Court should grant the petition and review that decision.

I. BY UPHOLDING EPA'S SUBSTITUTION OF COST FOR AIR QUALITY IN DETERMINING WHETHER AN AIR QUALITY CONTRIBUTION IS SIGNIFICANT, THE COURT OF APPEALS' DECISION CONFLICTS WITH BASIC PRINCIPLES OF ADMINISTRATIVE LAW ESTABLISHED BY THIS COURT'S CASES.

EPA asserts that this case need not be reviewed because the Agency in its rulemaking examined whether one state's emissions *significantly* contribute to another state's ozone nonattainment based on air quality considerations, rather than cost. EPA Br. 10 (the petitions "rest largely on the mistaken assertion that the NO_x SIP Call 'rel[ies] on cost-effectiveness, to the exclusion of air quality effects, in assessing whether one state's emissions contribute "significantly" to another state's ozone nonattainment air quality.'"). The rulemaking

record contradicts EPA's assertion and shows that EPA is now attempting to avoid review based on a rationale that EPA did not use to support its significant contribution findings. EPA's characterization is revisionist history.

EPA used a two-step process to make its significant contribution findings. The first step was to determine whether a state made *any* contribution to another state's ozone nonattainment area. In this first step, which did involve evaluation of air quality effects, EPA modeled air quality effects in downwind ozone nonattainment areas resulting from all man-made nitrogen oxide ("NO_x") and volatile organic compound emissions from each upwind state. 63 Fed. Reg. 57,391 (1998). If EPA found no air quality effects above a very low air quality effects threshold, EPA declared that there was no contribution (or "linkage") by the upwind state to the downwind state's nonattainment air quality. *Id.* ("The first step in evaluating this [modeling] information was to screen out linkages for which the contributions were very low...."). However, if an upwind state's effects exceeded EPA's very low threshold, EPA declared an air quality contribution "linkage" – *not* a "significant" contribution – between that state and the downwind state's nonattainment area, and then proceeded to the second step. In other words, EPA used its air quality threshold only as a screening tool to determine whether or not a state "contribute[s]" to downwind nonattainment, *not* to determine whether or not a state contributes "significantly."[1]

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[1] EPA appears to claim now that it used the air quality threshold to decide whether a contribution was or was not "significant." EPA Br. 10-11 n.6. This claim is wrong and misleading. EPA was careful to explain in the preamble to the final rule that, only "for ease of discussion," it used the term "significant" to describe the contribution "linkages" identified in the first step of its analysis. 63 Fed. Reg. 57,381 (1998). However, EPA

In the second step, EPA ignored air quality considerations entirely and evaluated whether a state's air quality contribution was "significant" within the meaning of § 110(a)(2)(D)(i) by calculating the amount of that state's NO_x emissions that, in its view, could be controlled cost-effectively. 63 Fed. Reg. 57,381 (1998). EPA established a cost-effectiveness "cutoff" of $2000 per ton of NO_x removed.

Thus, EPA's "actual finding of significant contribution" (*id.*) was that amount of NO_x emissions in each "contributing" state that EPA estimated could be eliminated at a cost of $2000 per ton or less. Whether and to what extent that amount of NO_x emissions had any effect on air quality in any downwind nonattainment area was never determined by EPA and therefore played no role whatsoever in EPA's significant contribution findings.[2]

As Judge Sentelle recognized below, EPA's approach reads out of the Clean Air Act the word "significantly." *See* Pet. App. 59a-60a (Sentelle, J., dissenting). If a state is identified as "contributing," *i.e.*, is shown to cause air quality

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made clear that its "actual finding of significant contribution" – *i.e.*, its determination of whether a given contribution rises to the level of "significance" demanded by the statutory text – was based on its cost-effectiveness cutoff, not on any air quality evaluation. *Id.*

[2] EPA indicates that, after its second step, it went on to a third step that involved additional air quality modeling using the "cost-effective" NO_x emission reductions. EPA Br. 11. However, because that modeling was done on a regional, not state-specific, basis, it revealed nothing about whether any one state's emissions were having *any*, let alone a "significant," air quality impact in another state's ozone nonattainment area. Section 110(a)(2)(D)(i)'s plain language allows EPA to make a finding of "significant contribution" based only on emissions from "within ... [a] State"; it prohibits EPA from making such findings based on multi-state aggregations of emissions.

effects above the very low air quality threshold level chosen by EPA for distinguishing between *any* contribution and no contribution, the statute makes clear that EPA's second step should have been to evaluate whether that contribution to nonattainment air quality is "significant" *based on air quality considerations*. By contrast, EPA evaluated the "significance" of the contributions it found only by examining whether and how much NO_x emissions can be eliminated at $2000 per ton. Thus, under EPA's approach, each state with *any* contribution was automatically found to "contribute *significantly*" in violation of § 110(a)(2)(D)(i), in an amount equivalent to the amount of NO_x emissions that can be removed for $2000 per ton – irrespective of whether that amount of emissions has *any* effects on air quality in a downwind nonattainment area.

If EPA in the rulemaking had proposed, justified, and used its air-quality-contribution threshold as the point at which a contribution becomes "significant" under § 110(a)(2)(D)(i), then the characterization of its action in its Brief would be accurate. However, EPA did not propose its air quality threshold as a significance test, EPA did not justify that threshold for that purpose, and, most important, EPA did not use that threshold – or any air quality test – as its test for "significance" of contribution. Instead, EPA used that threshold only to determine whether *any* contribution existed at all, and then applied its $2000-per-ton cost-effectiveness cutoff to determine what contribution was "significant" within the purview of § 110(a)(2)(D)(i).

EPA's substitution of cost for air quality effects to determine the significance of an air quality contribution violates the fundamental administrative-law and separation-of-powers principle requiring Executive Branch agencies to base their

actions on the decisional criterion imposed by Congress in the governing statute – here, the amount of *air quality* contribution to another state's nonattainment of air quality standards that is "significant." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). If left unreviewed, the majority's decision upholding EPA's approach will undermine that fundamental principle and established case law reflected in numerous decisions applying that principle. *See, e.g., Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995).

Like the majority below, EPA here relies on *NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc), to support its argument that it can consider cost in determining "significant contribution." In fact, however, that case supports Petitioners' position and confirms the unlawfulness of EPA's SIP call rule. The court in *NRDC v. EPA* unanimously *rejected* EPA's attempt to replace the Clean Air Act's decisional criterion for establishing hazardous air pollutant standards – *i.e.*, safety in terms of public health – with EPA's own cost criterion. The court found that, "in the face of uncertainty about risks to health, [EPA] has simply substituted [cost and] technological feasibility for health as the primary consideration under [Clean Air Act] Section 112." *Id.* at 1163. The court held that EPA must make "an initial determination of what is 'safe' ... based *exclusively* upon the Administrator's determination of the risk to health at a particular emission level." *Id.* at 1164 (emphasis added). Only after EPA determined, based on that statutory criterion, that the Act's standard of public health "safety" was assured could cost and technological feasibility play any role in EPA's choice among a range of *margins* of safety. *Id.* at 1165.[3]

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[3] *But cf. American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1040-41(construing other Clean Air Act provisions, and holding that EPA may

The other cases cited by EPA (and the majority below) also support, rather than contradict, Petitioners' position here. *See* EPA Br. 16 n.13; Pet. App. 23a. For example, in *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999), the FAA, in determining whether overflight regulations satisfied the statutory criterion of "substantial restoration of natural quiet," relied solely on a measure of quiet to define "substantial restoration." *Id.* at 461-62. Only after it had established the meaning of "substantial restoration" consistent with the statute's decisional criterion (based on a measure of "quiet") was the agency allowed to consider cost in adopting a specific program to satisfy the statute. *Id.* at 475.[4] Here, in contrast, EPA ignored air quality in determining whether the governing statutory criterion of significant contribution to nonattainment air quality was met.

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not consider cost in establishing national ambient air quality standards), *modified on reh'g on other grounds*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 and 2193 (2000) (Nos. 99-1257, 99-1426, argued Nov. 7, 2000). In the present case, the court below neither cited its then-recent decision in that case nor tried to explain how it could be reconciled with *NRDC v. EPA*.

[4] The majority below, but not EPA here, also relied on this Court's plurality decision in *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980). Pet. App. 21a-22a. However, that decision made clear that the Secretary of Labor, in assessing "significant" risk of harm, could not substitute cost considerations for the statute's decisional criterion, risk of harm to health. *See Industrial Union Dep't*, 448 U.S. at 639-46. A plurality of this Court held that, because the benzene standard at issue there was based on the lowest economically and technologically feasible level, rather than on consideration of the statute's decisional criterion, promulgation of the standard was unlawful. *See id.* at 659; *see also* Pet. App. 60a n.1 (Sentelle, J., dissenting) (discussing *Industrial Union Dep't*).

Consistent with this case law, Petitioners do not argue that EPA is prohibited from considering cost in fashioning a *remedy* to address a violation of § 110(a)(2)(D)(i)'s prohibition on significant contribution. *See* Pet. 13, 18 (discussing Clean Air Act § 110(k)(5), 42 U.S.C. § 7410(k)(5) (authorizing SIP calls to "mitigate adequately" interstate transport that has been found to "contribute significantly")). However, requiring a state to fashion *any* remedy – whether or not based on cost – is lawful *only after* a determination has been made, based on the statute's decisional criterion, that that state creates a significant air quality contribution to nonattainment air quality in another state. Cost-effectiveness of controls cannot, consistent with Congress' choice of language in § 110(a)(2)(D)(i), be substituted for air quality in making that significant contribution determination.

The language and structure of § 110(a)(2)(D)(i) leave no doubt that the scope and nature of air quality effects must govern any determination of whether a contribution to nonattainment air quality is "significant." *See* Pet. App. 57a, 59a-60a (Sentelle, J., dissenting).[5] Because the majority below departed from Supreme Court precedent establishing that an agency's decision must be based on the decisional criterion provided by Congress, this Court should grant the petition for a writ of certiorari.

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[5] For this reason, there can be no basis for reaching step two of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and deferring to EPA's interpretation. That Congress did not expressly define "contribute significantly to nonattainment" is not determinative of whether *Chevron* step two can be reached; it is clear from the language of the Clean Air Act that the significance of an air quality contribution to a nonattainment air quality area must be judged based on air quality considerations. No other reading is possible given the statutory language.

II. BECAUSE THE LOWER COURT'S REASONING FOR REJECTING APPLICATION OF THE NON-DELEGATION DOCTRINE WOULD UNDERMINE THAT DOCTRINE, THIS COURT SHOULD HEAR THIS CASE.

The court below agreed that EPA's $2000-per-ton cost-effectiveness cutoff was not based on any intelligible principle found in the Clean Air Act, *i.e.*, EPA's "selection of the cut-off point was essentially unbounded." Pet. App. 27a; *id.* (EPA "neither rests that [cost-effectiveness] benchmark on anything in the language or function of § 110(a)(2)(D)(i)(I), nor otherwise explains why the resulting cut-off point represents the right degree of 'cost-effectiveness' (i.e., why 'highly cost-effective' should be at that 'height').").

The court nonetheless rejected the argument that EPA's choice of $2000 per ton violated the Constitution's non-delegation doctrine, on the grounds that EPA's action currently affects only "[n]early half of the nation" and not "all American enterprise." *Id.* 28a. Contrary to established law, the court invoked a putative rule that, where agency action affects less than the entire nation, delegation-limiting intelligible principles may permissibly be less "precise" (*id.* 27a) as the basis for judicial affirmation of Executive Branch action that is wholly unconstrained – "unbounded," in the court's words – by *any* intelligible principle, precise or not.

In its response, EPA does not even try to argue that the court's "nationwide effect" prerequisite to application of the Constitution's protection against excessive delegation of legislative authority is correct or defensible. *See* EPA Br. 20. Rather, EPA asserts that its action was constitutional under this Court's precedents addressing the non-delegation doctrine. *Id.* ("The Court need not rely on ... [the court's test]

because Section 110(a)(2)(D) is constitutional under any reasonable view of the nondelegation doctrine.").

Petitioners ask this Court to review the court of appeals' decision, not the reasoning presented in EPA's response. EPA's reasoning contradicts the decision below; unlike the D.C. Circuit, EPA claims that there *was* an intelligible principle that guided its selection of the $2000-per-ton cutoff. Review of the lower court's decision should not be denied on the basis of an argument that that court rejected.

EPA also argues that this Court should not accept Petitioners' invitation to review the issue of the consistency of EPA's $2000-per-ton cutoff with the Administrative Procedure Act's ("APA") prohibition on "arbitrary and capricious" agency action, 5 U.S.C. § 706(2)(A). EPA Br. 21. Yet, if, as the court below held, EPA's selection of the cutoff "was essentially unbounded," Pet. App. 27a, *and* if, as both the court's opinion and EPA assert, EPA's action did not violate the non-delegation doctrine, then EPA's action must have been arbitrary and capricious under the APA. Thus, even if EPA's action did not violate the non-delegation doctrine, this Court should grant certiorari to review why EPA's action was not found deficient under the APA. To let the decision below stand would serve as precedent for agencies to exercise unfettered discretion in violation of the APA so long as they can avoid a finding of violation of the non-delegation doctrine – a result that would vitiate the APA's safeguard against arbitrary and capricious Executive Branch action.

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF WEST VIRGINIA CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR CERTIORARI BY THE MIDWEST OZONE GROUP AND APPALACHIAN POWER COMPANY, *ET AL.*

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RESPONSE OF
WEST VIRGINIA CHAMBER OF COMMERCE
IN SUPPORT OF PETITION FOR CERTIORARI
BY THE MIDWEST OZONE GROUP AND
APPALACHIAN POWER COMPANY, *ET AL.*

Respondent West Virginia Chamber of Commerce supports the Petition of the Midwest Ozone Group and Appalachian Power Company, *et al.* for a writ of certiorari to review the District of Columbia Circuit Court of Appeals' rulings in *State of Michigan, et al. v. United States Environmental Protection Agency*, Case No. 98-1497 and consolidated cases.

Respectfully submitted,

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